TRANSCRIPT OF RECORD.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 289.

HENRY E. REYNOLDS, GEORGIANNA L. REYNOLDS, HENRY B. WILBUR, HARRY A. WILBUR, MARGARET T. O'REILLY, ELIZABETH M. O'REILLY, MARGARET B. DETMAR, ELIZABETH S. SPRAGUE, AND JOHN S. TRAVER, PLAINTIFFS IN ERROR,

vs.

ROBERT F. STOCKTON, RECEIVER OF THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

FILED OCTOBER 29, 1887.

necessary, consists in the fact that the lands in controversy were bought by Jewell at a sale in bankruptcy of Myrick's property and effects (see Myrick's testimony on page 71, near bottom of printed Record) in 1874, eight years prior to the sale by Jewell to Myrick and Mrs. Daniel, who was Myrick's daughter, as testified by Myrick. (See his evidence on page 71.)

As Myrick owned the lands before Jewell acquired title to them, as Jewell's title was acquired from Myrick, no warranty to Myrick or his daughter was necessary.

CLIFFORD ANDERSON,
Counsel for Appellees.

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140-254

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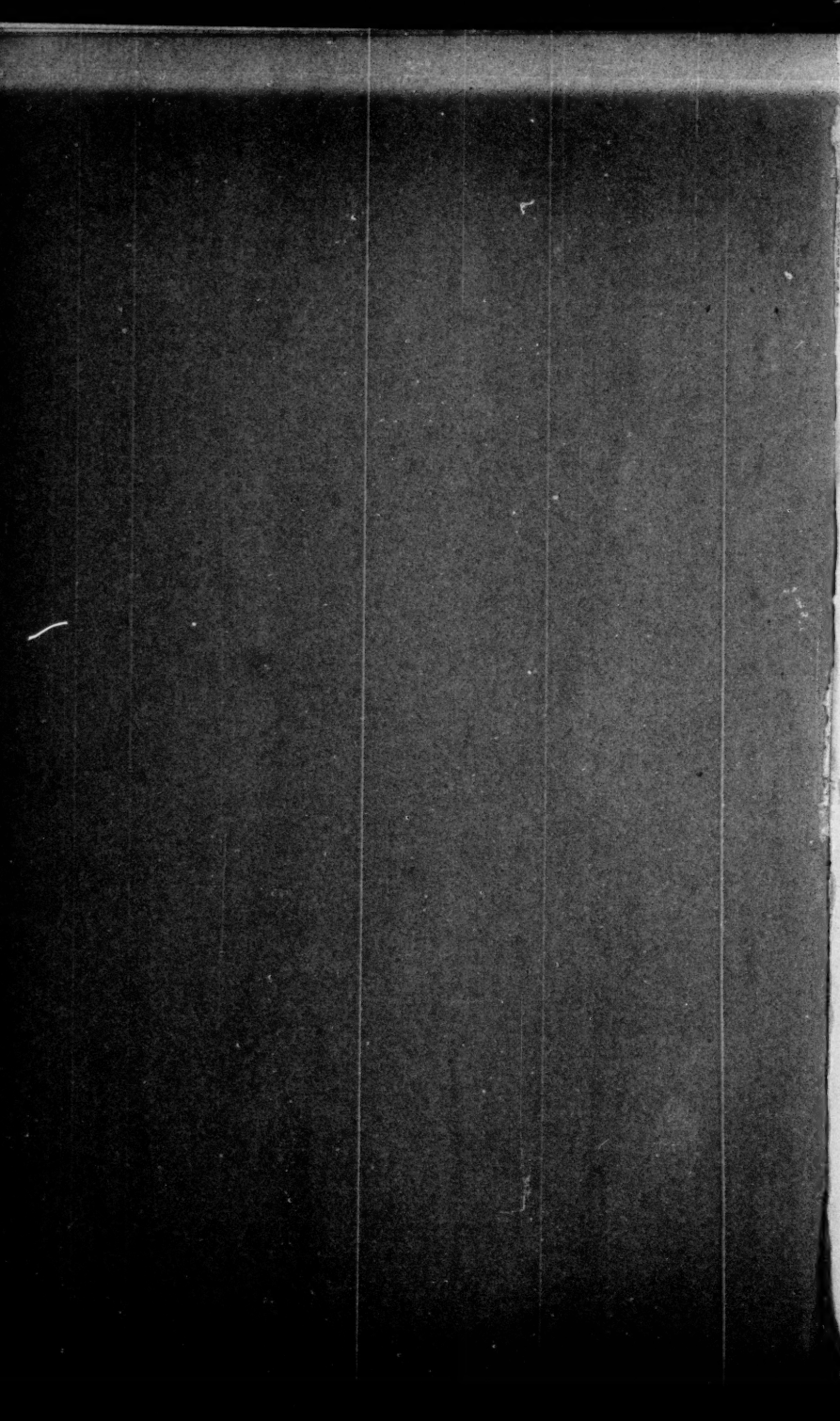
ROBERT F. STOCKTON, RECEIVER OF THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

FILED OCTOBER 28, 1887.



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INDEX.

	Original.	Print.
Petition of Henry E. Reynolds *et al.*	1	1
Order to show cause	3*a*	2
Order extending time in which to prove claims, &c.	4	3
Rejection of claim of Henry E. Reynolds *et al.*	4½	3
Petition of appeal of Henry E. Reynolds *et al.*	5	4
Answer of receiver to petition of appeal	7	5
Hearing on appeal before advisory and special master	16	11
Appellant's offers	16	11
Laws of New York, 1853, &c.	18	12
Record in Reynolds *et al. vs.* Smyth *et al.*, supreme court of New York	21	13
Summons	21	13
Complaint	22	14
Answer of receiver of New Jersey Mutual Life Insurance Company *et al.*	37	23
Answer of Jno. F. Smyth, superintendent, &c.	41	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 13, 1890.

	Original.	Print.
Order referring cause to referee, &c.	46	28
Decision upon matters of fact and law	50	30
Interlocutory judgment	59	36
Order confirming report of referee, &c.	62	37
Judgment	68	41
Certificates	70	41
Affidavit of Raphael J. Moses, Jr.	72	43
Notice of motion for judgment	73	43
Affidavit of service of motion papers	74	44
Affidavit of Raphael J. Moses, Jr.	75	44
Agreement between The Hope Mutual Life Insurance Company of New York and The New Jersey Mutual Life Insurance Company of New Jersey, September 28, 1872	76	45
Agreement between The Hope Mutual Life Insurance Company of New York and The New Jersey Mutual Life Insurance Company, October 1, 1872	78	46
Agreement between The New Jersey Mutual Life Insurance Company and The Hope Mutual Life Insurance Company, December 31, 1872	79	47
Resolution of board of directors of The Hope Mutual Life Insurance Company, April 9, 1873	82	49
Notice of the superintendent of insurance department of New York, April 11, 1873	82	49
Exhibit 1 for respondent—Order of supreme court of New York, March 22, 1886, in two actions	83	50
Memorandum of advisory master	87	52
Judgment dismissing appeal	89	53
Petition of appeal to court of errors and appeals	91	54
Notice of appeal to court of errors and appeals	92	55
Opinion of court of errors and appeals	93	55
Judgment of court of errors and appeals	99	58
Stipulation as to record	101	58
Clerk's certificate	102	59
Petition for writ of error	103	59
Allowance of writ of error	107	61
Citation	109	61
Writ of error	111	62
Bond	115	63
Order to enter and file decree *nunc pro tunc*	119	64
Judgment on remittitur	121	64
Clerk's certificate	124	65

1 In Chancery of New Jersey.

JACOB VANATTA, Informant,
and
THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY, Defendants.

To the Hon. Theodore Runyon, chancellor of the State of New Jersey:

The petition of Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver respectfully shows that they were policy-holders and stockholders in the Hope Mutual Life Insurance Company, and in their own behalf and in behalf of all others similarly situated they brought an action in the supreme court of the State of New York on the seventh day of February, 1879, against the New Jersey Mutual Life Insurance Company and Joel Parker, the receiver thereof, for the purpose, among other things, of setting aside and declaring void the contract of reinsurance entered into between the Hope Mutual Life Insurance Company and the New Jersey Mutual Life Insurance Company on or about the 31st day of December, 1872, and to recover back the property transferred by the Hope Mutual Life Insurance Company to the New Jersey Mutual Life Insurance Company pursuant to said contract, and that in said action said New Jersey Mutual Life Insurance Company and Joel Parker, receiver, appeared and answered, and the matter has been litigated between these petitioners and the said company and said receiver from the commencement of this suit until the eleventh day of October,
2 1886, when final judgment was rendered in favor of the petitioners and against the New Jersey Mutual Life Insurance Company and Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, for one million ten thousand four hundred and ninety-six dollars and twenty-nine cents, as appears by an exemplified copy thereof presented herewith.

And your petitioners further show that after the appointment of the Hon. Joel Parker as receiver in New Jersey he was appointed ancillary receiver in the State of New York in a suit there instituted by Jacob Vanatta, attorney general of New Jersey, and William Geasa, a creditor in New York, and received into his possession, as such ancillary receiver in New York, the sum of fourteen thousand dollars or thereabouts, and afterwards, in April last, in proceedings had in the supreme court in the State of New York in said suit brought by Jacob Vanatta and William Greasa, without notice to your petitioners and without any knowledge or suspicion on their part that any such action was intended or being had, an order was obtained settling the receiver's accounts and transferring the balance, amount- to some seventy-nine hundred dollars, to the receiver in New Jersey, and this sum was received by him and reported by him to the court of chancery.

And these petitioners further show that they made no claim in New Jersey within the time in which creditors were directed to prove their claims, because they had made the claim in New York, and the question whether there was anything due depended on the result of that litigation, and this depended chiefly on the main point in issue in the case, whether the Hope Company was indebted to the New Jersey Company or the New Jersey Company to the Hope Company, and this litigation has been prosecuted with the utmost diligence on the part of the petitioners and contested at every point with the greatest earnestness on the part of the receiver, and that a decree was not obtained until two days ago, the 11th day of October instant, and that notice of the motion for the final decree was
3 given to the present receiver in New Jersey and to his counsel, as well as to the counsel of the receiver in New York.

And these petitioners further say that the receiver in New Jersey has not only assets obtained in New Jersey and not yet distributed, but also the said sum of seventy-nine hundred dollars or thereabouts taken from New York, and another sum, amounting to $1,540, which should have been paid to the superintendent of insurance in New York as trustee for the policy-holders of the Hope Company and distributed to the petitioners under the decree entered in their suit against Joel Parker, receiver in New York, entered March 7, 1885, and that the sum is six months' interest on a mortgage of forty-four thousand dollars, made by John Trenor and deposited by the Hope Company before December 31st, 1872, with the superintendent of the New York insurance department as security for its policy-holders, the statute permitting a company while solvent to receive the interest on mortgages so deposited, and this interest having been paid to Joel Parker, receiver, instead of to the New York superintendent by Man & Parsons, the attorneys of the mortgagor, who were also the attorneys of the receiver.

And your petitioners pray leave to present their claim to the receiver in New Jersey, and that so far as they are concerned the court will order the time limited for proving claims to be extended for two weeks after leave given, so that their claim may be duly presented to the receiver for his determination and allowance.

Boston, Oct. 22, 1886.

GEORGIANA L. REYNOLDS.

Subscribed and sworn to before me, at Boston, county of Suffolk, State of Massachusetts.

CHAS. S. HANKS,

[SEAL.] *Notary Public in and for the County of Suffolk.*

In Chancery of N. J.

3a Between—

JACOB VANATTA, Informant,
and
THE NEW JERSEY MUTUAL LIFE INSURANCE CO., Defendants.

Upon reading and filing the petition of Henry E. Reynolds and

other plaintiffs in a suit in the supreme court of New York against Joel Parker, receiver of the New Jersey Mutual Life Insurance Company, and the said company, whereby it appears that they have a claim against said company based upon a judgment recovered in said supreme court on the eleventh day of October instant for one million ten thousand four hundred and ninety-six $\frac{29}{100}$ dollars in a suit begun on the seventh day of February, 1879, and upon reading the affidavits accompanying the said petition and an exemplified copy of the said judgment, it is now, on this eighteenth day of October, A. D. 1886, on motion of Edw. Q. Keasbey, of counsel with the petitioners, ordered that Robert F. Stockton, Esq., the receiver of said company in New Jersey, do show cause before this court on Monday, the twenty-fifth day of October instant, at 10 a. m., at the chambers of the vice-chancellor, in the city of Newark, why the prayer of the petitioners should not be granted and the time limited for proving claims be extended as to them for two weeks after leave given and why they should not have leave to present their claims
3*b* to the receiver for his determination and allowance thereof, so that they may receive their dividend thereon.

ALEX. T. McGILL, Jr., *C.*

Respectfully advised.

A. V. VAN FLEET, *V. C.*

4 In Chancery of N. J.

JACOB VANATTA, Informant,
and
THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY, Defendants.

An order to show cause having been made in this matter directing Robert F. Stockton, the receiver of said company, to show cause why the time should not be enlarged within which claims may be presented to the receiver—

Now, upon hearing counsel upon both sides, it is ordered that the time limited for proving claims be extended for ten days, and that the petitioner and other creditors be permitted within that time to present their claims to the receiver for his determination thereof.

Dated Nov. 1, 1886.

THEODORE RU[illegible]YON, *C.*

Respectfully advised.

A. V. VAN FLEET, *V. C.*

4½ *Rejection of Claim of Henry E. Reynolds et als.*

To the Hope Mutual Life Insurance Company, Henry E. Reynolds, *et al.:*

The claim of Henry E. Reynolds, Henry B. Wilbur, *et al.*, plaintiffs, in a suit in the supreme court of the State of New York brought by them against John F. Smyth, superintendent; The Hope Mutual

Life Insurance Company of New York, Joel Parker, receiver of the New Jersey Mutual Life Insurance Company, *et al.*, in respect of a judgment recovered by them in said suit against Joel Parker, receiver as aforesaid, for one million ten thousand four hundred and ninety-six dollars and twenty-nine cents, having been duly considered by me, & I being satisfied that the same ought not to be allowed, is hereby rejected, and notice for such rejection is hereby given to you.

Dec. 8th, 1886, Trenton, N. J.

R. S. STOCKTON,
Receiver of the New Jersey Mut. L. Ins. Co.

5 In Chancery of New Jersey.

Between—

THE ATTORNEY GENERAL OF NEW JERSEY, Informant, and THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY, Respondents. } On Information.

Petition of Appeal of Henry E. Reynolds and Others.

To the Honorable Theodore Runyon, chancellor of the State of New Jersey:

The petition of Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver respectfully shows that your petitioners, having recovered a judgment in the supreme court of the State of New York against The New Jersey Mutual Life Insurance Company and Joel Parker, as receiver thereof, in New York, for one million ten thousand four hundred and ninety-six dollars and twenty-nine cents, in favor of themselves and the other policy-holders and stockholders of the Hope Mutual Life Insurance Company, did heretofore, to wit, on the 1st day of November last, and within the time limited by an

6 order of this court made in this cause on that day, present their claim for allowance to Robert F. Stockton, the receiver appointed in this cause.

That said claims were presented in due form, properly verified by affidavits and by an exemplified copy of said judgment, and submitted to said receiver, and that said receiver accepted the proofs as sufficient in form, but after considering said claim he refused to allow the same or any part thereof, and on the eighth day of December instant gave notice to your petitioners that he rejected their claim; and your petitioners conceive that they are aggrieved by said determination of said receiver and insist that their said claim ought to be allowed, and that they should be paid their proportion of the assets of the New Jersey Mutual Life Insurance Company in the hands of said receiver, and that before making distribution there should be paid over to them the sum of seven thousand nine

hundred dollars or thereabouts, assets of the New Jersey Mutual Life Insurance Company in New York, which should not have been taken by the receiver in New Jersey until after the payment of your petitioners' claim, and also the sum of fifteen hundred and forty dollars, interest on a mortgage belonging to the Hope Mutual Life Insurance Company, which was paid to the receiver of the New Jersey Mutual Life Insurance Company by mistake; and your petitioners respectfully appeal to this honorable court from said determination of said receiver refusing to allow their claim, and pray that the same may be reversed, and that such order may be made in the premises as shall be agreeable to equity and good conscience.

A. Q. KEASBEY & SONS,
Solicitors for Petitioners.

7 In Chancery of New Jersey.

Between—

THE ATTORNEY GENERAL OF NEW JERSEY, Informant, and THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY, Respondent.	On Information. On Petition of Appeal of Henry E. Reynolds *et al.* from Determination of Receiver.

The answer of Robert F. Stockton, receiver, to the petition of appeal of Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver.

1. The receiver admits that the petitioners presented to him the claim mentioned in their petition for allowance, and that the same purported to have been verified by affidavit, but this defendant denies the validity of said claim and of any part thereof. He admits that he rejected the same, and that he notified the petitioners of such rejection on the eighth day of December, anno Domini eighteen hundred and eighty-six.

2. And this respondent denies that before making distribution there should be paid over to the petitioners either the sum of seven thousand nine hundred dollars or the sum of fifteen hundred and orty dollars or any sum of money whatever. He denies that said moneys were paid by mistake, and, answering, he says that said payments were made to respondent with the sanction and approval of the supreme court of the State of New York and of this court, and he respectfully insists that even if the appellants' claim were a valid one neither they nor the Hope Mutual Life Insurance
8 Company would be entitled to any greater proportion of such sums than any other creditor of the New Jersey Mutual Life Insurance Company.

3. And this respondent, further answering, says that at the time of the entry of pretended judgment in the petition of appeal mentioned Joel Parker, the late receiver of the New Jersey Mutual Life Insurance Company by appointment of the supreme court of the State of New York, had been by that court discharged from all liability of

every kind and description and the bonds given by him upon his appointment as such had also been discharged, and that neither he nor the said The New Jersey Mutual Life Insurance Company, which is a corporation incorporated by the laws of the State of New Jersey, were thereafter liable in any manner to be sued or prosecuted in the State of New York for any matter whatsoever unless properly brought into court; that the suits of Henry E. Reynolds *et al.* in the said petition mentioned had been prosecuted to a conclusion long prior to such discharge and such judgment rendered therein as by the record and proceedings in that case the parties were entitled to, and that if any further proceeding was taken therein such proceedings were not simply irregular, but *coram non judice* and void, and the court in which the proceeding was prosecuted was without jurisdiction to make any order of the kind in said petition of appeal specified.

4. And this respondent, further answering, says that if said alleged judgment had been obtained by the appellants, as alleged, it was obtained without due notice to Joel Parker, late receiver as aforesaid, and to the New Jersey Mutual Life Insurance Company, and is therefore void and of no effect so far as concerns Joel Parker, this respondent, and said company and its assets.

5. And this respondent, further answering, says that the said suit of the appellants, mentioned in their petition of appeal, was
9 instituted for the purpose of demanding judgment; that the defendant John F. Smyth, the superintendent of the insurance department of the State of New York, should be adjudged to account for all sums of money, bonds, and securities which were deposited in his hands by the defendant The Hope Mutual Life Insurance Company of New York, and for all interest, increase, and accumulations of the said fund, and every part thereof; that the said securities should be ordered to be sold by order of the supreme court of New York; that the proceeds thereof should be distributed among the plaintiffs and other policy-holders of the said The Hope Mutual Life Insurance Company in the proportion in which they should be entitled to the same; that the said The Hope Mutual Life Insurance Company of New York might be dissolved and adjudged by this honorable court to have surrendered and abandoned all its rights, privileges, and franchises as an incorporated life insurance company, and that after the payment of the policy-holders and creditors of the said company that any surplus that might be left of the said trust fund and accumulations thereof might be distributed among the stockholders of the said company, and that the plaintiffs might have such other, further, or different order or relief in the premises as might be just and equitable, and that the defendant John F. Smyth, the superintendent of the insurance department, his officers, servants, agents, attorneys, and all other persons acting for or under him should be enjoined from converting the said securities, or paying or distributing or parting with the same or any part thereof, except under and pursuant to an order or decree to be entered in this action.

6. That the complaint, which was the only pleading of the appel-

lants, contained no allegations on which a prayer for judgment against the New Jersey Mutual Life Insurance Company in favor or on behalf of the Hope Mutual Life Insurance Company, ascertaining the general balance due from either company to the other, could be based; that no issue was made by the pleadings in
10 that case on which the true state of the account between the Hope Mutual Life Insurance Company and the New Jersey Mutual Life Insurance Company could have been tried; that in point of fact no such issue was tried, the trial being confined to the allegations of fact set forth in the pleadings, and that if any judgment was afterwards rendered in favor of said Hope Company or of the appellant as representing it against Joel Parker, as receiver of said company, or against said company, purporting to ascertain the amounts due from either company to the other on a general balance of account, it was altogether nugatory and void, as by reference to said complaint and the answer of Joel Parker and of the New Jersey Mutual Life Insurance Company and to the other pleadings in the case will more fully and at large appear.

7. And this respondent, further answering, says that the Hope Mutual Life Insurance Company was not a party to said suit and did not appear or plead therein, and that it was impossible in its absence to state the account between it and the New Jersey Mutual Life Insurance Company, and that any judgment purporting to adjudge what the true state of the account between said companies was, was and is altogether nugatory and void as against this respondent and the company of which he is receiver.

8. And this respondent respectfully insists that even if said judgment was valid by the laws of this State against those who were parties thereto, which he denies, it was not valid against your petitioner, who was not a party, and that he is not bound thereby; and he further insists that the receivership of said company in New York was auxiliary merely to the receivership constituted by this court, and that the ancillary receiver has no power to bind this respondent by any acts done or suffered to be done in the foreign jurisdiction on behalf of this company which he represents, and that this respondent has never in anywise authorized or consented to the adjudication of the question of the indebtedness of the
11 New Jersey Mutual Life Insurance Company to the Hope Mutual Life Insurance Company by any persons or tribunals other than those constituted by the laws of the State of New Jersey, and is not bound nor is the New Jersey Mutual Life Insurance Company bound by any acts or omission of said ancillary receiver, and that he still possesses the right to litigate *de novo* the question of said indebtedness.

9. And this respondent, further answering, says that the New Jersey Mutual Life Insurance Company is not indebted to the Hope Mutual Life Insurance Company in any sum whatsoever, but that if an account should be taken between them it would appear that the Hope Mutual Life Insurance Company is indebted to the New Jersey Mutual Life Insurance Company in a very large sum of money, the ex-

act amount of which can only be ascertained by an accounting to be had between them.

10. And this respondent, further answering, says that on or about the twenty-eighth day of September, eighteen hundred and seventy-two, the Hope Mutual Life Insurance Company entered into an agreement with the New Jersey Mutual Life Insurance Company of the tenor following: "This agreement, made this day hereinafter stated by and between the Hope Mutual Life Insurance Company of New York, of the first part, and the New Jersey Mutual Life Insurance Company of New Jersey, of the second part, witnesseth: That the said parties, in consideration of the covenants and agreements hereinafter stated, do hereby mutually covenant and agree each with the other as follows, to wit: That for and in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, and for further valuable considerations hereinafter mentioned the said Hope Mutual Life Insurance Company of New York, party of the first part, does hereby reinsure all policies in force issued by the New Jersey Mutual Life Insurance Company, party of the second part, with the resumption of all liability of non-forfeiture on
12 same and on all policies issued by said company, party of the second part, not renewed, and also assumes all liabilities for dividends declared by said company, party of the second part, on policies in force at the date of this agreement, and also assume all other liabilities on said policies. The said company party of the first part also assumes all liabilities of the said company party of the second part for losses unpaid, contested, or otherwise, with all expenses incurred in settlement of same.

Said company, party of the first part, also assumes all liabilities of said company, party of the second part, under contracts with agents, and carry out agreements so made in good faith. Said company, party of the first part, assumes and agrees to pay all claims and indebtedness of the said company, party of the second part, for losses incurred and unpaid, as well as other liabilities as shown by said New Jersey Mutual Life Insurance Company, party of the second part. Said company, party of the first part, hereby agrees to continue the pay of officers and employees of said company, party of the second part, to the thirty-first day of December, A. D. 1872, inclusive, whose services shall be rendered to said party of the first part to perfect the transfer of the business of the said party of the second part to said company, party of the first part; said party of the first part to assume leases of offices and pay any other liability as may be due by said company, party of the second part.

Said company, party of the first part, also agrees with said company, party of the second part, to pay the stockholders of the said company, party of the second part, the amount of capital stock held by them, to the amount of one hundred thousand dollars, which same was actually subscribed for and paid into said company, party of the second part, and will also pay said stockholders above mentioned a bonus of fifty per cent. on said capital stock paid in to, say, the sum of fifty thousand dollars, which sum of one hundred thousand dollars and fifty thousand dollars to be paid said company or

stockholders out of the bonds and mortgages now held by
13 said company, party of the second part, as may be agreed upon by both parties to this agreement; and said party of the second part, in consideration of the foregoing covenants and agreements herein stated by said company, party of the first part, do hereby sell, transfer, assign, and make over to said party of the first part all the assets, claims, contracts, reinsurances of risks, and entire business of every nature now possessed, owned, and held by said company, party of the second part. It is agreed that this contract take effect October 1, 1872."

11. That said agreement was duly executed under the corporate seals of said respective companies, and the same was carried into effect by an assignment, made on or shortly after the first day of October, eighteen hundred and seventy-two, of bonds and mortgages held by the New Jersey Mutual Life Insurance Company to the amount of one hundred and fifty thousand dollars or thereabouts to the stockholders thereof, and by a further assignment, made on said first day of October, of all the remaining property and assets of the New Jersey Mutual Life Insurance Company, and the business of the consolidated companies was for some time thereafter carried on in the name of the Hope Mutual Life Insurance Company.

12. That said agreement was procured by fraudulent representations made by the Hope Mutual Life Insurance Company and its directors to the effect that the Hope Mutual Life Insurance Company was solvent, whereas in point of fact it was insolvent.

13. That very shortly after said transfer of said assets took place a sufficient number of the directors of the New Jersey Mutual Life Insurance Company resigned, and a sufficient number of the directors of the Hope Mutual Life Insurance Company were elected in their stead to enable the directors of the Hope Mutual Life Insurance Company to control both organizations, and from that time down to the failure of the consolidated companies, in the year eighteen hundred
14 and seventy-seven, the New Jersey Mutual Life Insurance Company was completely under the control of the directors of the Hope Company and those whom they elected to succeed them.

14. That at the time of the consolidation of the two companies the New Jersey Mutual Life Insurance Company was a solvent corporation, doing a large business and having a large amount of valuable assets, and that the object of the Hope Mutual Life Insurance Company and its directors in getting control of the said The New Jersey Mutual Life Insurance Company and of its said assets was to enable them fraudulently to convert said assets to the use of individual directors of the Hope Company and their confederates, and that immediately after so getting control as aforesaid the officers and directors of the Hope Company began to possess themselves of said assets and to convert them to their own use and benefit, contrary to the trust reposed in them, and to substitute for the same worthless and fraudulent securities. These they represented to the public and to the several insurance departments of the different States as good, and in this way they maintained an appearance of solvency while

engaged in the work of despoiling the New Jersey Mutual Life Insurance Company of nearly all its property.

15. That shortly after the transfer of assets mentioned in paragraph eleven hereof it was found that much dissatisfaction existed among the agents and policy-holders of the New Jersey Mutual Life Insurance Company and among the public generally in reference to said reinsurance. To allay this dissatisfaction it was resolved by the directors of the Hope Company thereafter to carry on the business of the consolidated companies in the name of the New Jersey Company, and a formal change in that regard was made, but the illegal agreement set forth in paragraph ten hereof was in all other respects acted upon and continued in full force.

16. That to give color to said change of name some fraudulent and worthless or nearly worthless securities were transferred to the New Jersey Mutual Life Insurance Company by the Hope Mutual Life Insurance Company, and the business, after the first of January, eighteen hundred and seventy-three, was carried on in the name of the New Jersey Mutual Life Insurance Company, but both organizations were under the control of the aforesaid directors of said Hope Mutual Life Insurance Company, who managed the same, not for the benefit or in the interest of the policy-holders, but for the fraudulent purposes hereinbefore mentioned.

17. That all or nearly all the valuable assets of the Hope Mutual Life Insurance Company, except assets to the amount of one hundred thousand dollars or thereabouts, which had been deposited with the insurance department of the State of New York, had been wasted or otherwise disposed of before its amalgamation with the New Jersey Mutual Life Insurance Company, and that said fund of one hundred thousand dollars so deposited has recently been adjudged and decreed by the supreme court of the State of New York to belong to the stockholders, policy-holders, and creditors of the Hope Company exclusively, and that court has declared that the New Jersey Mutual Life Insurance Company had no interest therein or lawful claim thereto.

18. That at the time of said amalgamation and ever thereafter the liabilities of the Hope Company far exceeded its assets, and that when the individual policy-holders of the Hope Company were, subsequent to January first, eighteen hundred and seventy-three, reinsured in the name of the New Jersey Company, pursuant to the fraudulent agreement aforesaid, this latter company assumed a burden far in excess of the benefit conferred by said transfer of said assets and became itself insolvent in consequence; and this respondent respectfully insists that on an accounting between the said companies it will be found that the Hope Company is largely indebted to the New Jersey Mutual Life Insurance Company and the cause of and responsible for the latter company's failure.

R. F. STOCKTON, *Receiver.*
STEVENS & WARD, *Solicitors.*

In Chancery of New Jersey.

Between—

THE ATTORNEY GENERAL OF NEW JERSEY, Informant, and THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY, Respondent.	On Petition on Appeal by Henry E. Reynolds and Others.

For appellant, Mr. Edw. Q. Keasbey and Mr. Raphael J. Moses, Jr., of New York.

For the receiver of the New Jersey Mutual Life Insurance Company, respondent, Mr. F. W. Stevens.

Hearing on appeal before W. B. Williams, Esq., advisory and special master, February 26, 1887.

The appellant offers in evidence the following documents:

1. Summons and complaint in supreme court in New York at suit of Henry E. Reynolds *et al.* against John F. Smyth, superintendent of the insurance department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker,
17 receiver of the New Jersey Mutual Life Insurance Company, and the said The New Jersey Mutual Life Insurance Company.

(Printed copies of these, found on pages 1 to 19 of printed cases, are admitted by consent in place of exemplified copies.)

2. Answers to Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and the said The New Jersey Mutual Life Insurance Company, on pages 31 to 35 of printed case; and see pages 33 to 36.

3. Answer to John F. Smyth, superintendent as aforesaid, pages 36 to 41, inclusive (pages 37 to 42).

4. Order of reference of January 15th, 1880, on pages 978 to 981 of printed case (pages 42 to 45).

5. Findings of judge and direction for decree, separate pamphlet, pages 1 to 10 (pages 46 to 55).

6. Interlocutory judgment, separate pamphlet, pages 11 to 13, with the following endorsements (pages 55 to 57):

"Service of within copy of findings and interlocutory decree and order and notice of filing and entry thereof hereby admitted. New York, Sept. 17, 1881. (Signed) John E. Parsons, attorney for the receiver of New Jersey Mutual Life Insurance Company."

7. Decree entered in said cause March 7, 1885, against the other parties, reserving directions against Joel Parker, receiver, and others (pages 58 to 63).

8. Exemplified copy of the decree now in question, made and dated October 11, 1886, in the said suit in supreme court of New York against Joel Parker, receiver, &c., together with the papers upon which it was obtained, including admission by John E. Parsons, attorney, of service of notice of motion for said decree and affidavit of service upon the other parties (pages 64 to 67).

18 It is admitted that the Hope Mutual Life Insurance Company, although its name appears as a party defendant in the record, was not brought into court by process of summons or in any other way during the progress of the cause.

Mr. MOSES says: I propose to show why the Hope Company was not summoned. In the first place, I offer the agreement of September 30th, 1872, set up in defendants' answer, by which the New Jersey Mutual Life Insurance Company agreed to reinsure the Hope Mutual.

Also the agreement of December 31, 1872, referred to in the complainant's New York suit and contained in the printed case at pages 151–153 (pages 75 to 77).

Copy of resolution of the board of directors of the Hope Life Ins. Co. to close business April 9, 1873, page 579 of printed case (page 78).

Notice by the insurance department of such cessation of business April 11, 1873, page 577 (pages 78 and 79).

Chapter 463, Laws 1853, State of New York, and the amendment thereto by section 10 of chapter 263 of Laws of 1859, section 19, page 1502, of Revised Statutes of New York:

"When any company transacting the business of insurance under either of the departments specified in the first section of this act within the State of New York shall desire to relinquish its business the comptroller shall, on application of such company or association, under the oath of the president or principal officer and secretary or actuary, give notice of such intention in the paper in which the State notices are directed to be inserted at least twice a week for six months, and after such publication he shall deliver up to such company or association the securities held by him belonging to them on being satisfied, by the exhibition of the books and papers of such company or association and on examination, to be made by himself or some competent person, not officer of any life insurance company in this State, to be appointed by him, and upon the oath of the president or principal officer and the secretary or actuary of the same, that all debts and liabilities of every kind are paid
19 and extinguished that are due or may become due upon any contract or agreement made with any citizen of the United States; and the said comptroller may also from time to time deliver up to such company or association or its assigns any portion of said securities on being satisfied in manner and form aforesaid or by any other competent proof that all the debts and liabilities of every kind that are due or may become due upon any contract or agreement made with any citizen of this State by said company or association are less than one-half of the amount of the portion of said securities he shall still retain. Any foreign life insurance company desiring to discontinue business in this country and having made the aforesaid publication may, in the discretion of the superintendent of the insurance department, withdraw one-half of its deposits of one hundred thousand dollars on registering, according to the provisions of law for registered policies, all its outstanding policies issued to citizens or residents of the United States, and covenanting to maintain unimpaired the reinsurance deposit for

such registered policies at all future times, and specially pledging for their security all future premiums payable on American policies."

It is stipulated that all the above copies of papers offered on behalf of the plaintiff and defendant are admitted, subject to correction by the original, if necessary.

Also the following sections of "Code of Procedure in New York:"

SECTION 1207. "Where there is no answer the judgment shall not be more favorable to the plaintiff than that demanded in the complaint. Where there is an answer the court may permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issue."

SECTION 723. "The court may upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice and on such terms as it deems just, amend any process, pleading, or other proceeding by adding or striking out the name of a person as
20 a party or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting an allegation material to the case, or, where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceeding to the facts proved; and in every stage of the action the court must disregard an error or defect in the pleadings or other proceedings which does not affect the substantial rights of the adverse party."

SECTION 756. "In case of a transfer of interest or devolution of liability the action may be continued by or against the original party, unless the court directs the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party, as the case required."

21 New York Supreme Court.

Kings county is the county in which the plaintiffs desire the trial.

HENRY E. REYNOLDS Individually and HENRY E. Reynolds as Executor and Georgiana L. Reynolds as Executrix of the Last Will and Testament of Moses C. Reynolds, Deceased; Hervey B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Dettmer, Elizabeth S. Sprague, and John P. Traver, Plaintiffs,

against

JOHN F. SMYTH, as Superintendent of the Insurance Department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company, and the said The New Jersey Mutual Life Insurance Company, Defendants.

} Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action

and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer,
22 judgment will be taken against you by default for the relief demanded in the complaint.

Dated Feb. 7, 1879.

JOHN C. PERRY,
Plaintiffs' Attorney.

Office and post-office address, No. 346 Fulton street, Brooklyn, N. Y.

New York Supreme Court, Kings County.

HENRY E. REYNOLDS Individually and HENRY E. Reynolds as Executor and Georginia L. Reynolds as Executrix of the Last Will and Testament of Moses C. Reynolds, Deceased; Hervey B. Wilbur, Harry A. Wilbur, Robert T. O'Reilley, Elizabeth M. O'Reilley, Margaret B. Dettmar, Elizabeth S. Sprague, and John P. Traver, Plaintiffs,
against
JOHN F. SMYTH, as Superintendent of the Insurance Department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company, and the said The New Jersey Mutual Life Insurance Company, Defendants.
} Complaint.

23 The complaint of the plaintiffs, by John C. Perry, their attorney, respectfully shows and alleges as follows:

I. That the plaintiffs, the policy-holders hereinafter named, sue and bring this action on behalf of themselves and all others who are policy-holders in the Hope Mutual Life Insurance Company of New York, as well as all who are interested in the trust fund hereinafter mentioned and who shall in due time elect to come in and seek relief by contributing to the expenses of this action.

II. That the plaintiff, the stockholder hereinafter named, sues and brings this action in behalf of himself and all others who are stockholders in the said The Hope Mutual Life Insurance Company of New York, as well as in behalf of all who are interested in the assets of the said company or the trust fund hereinafter mentioned and who shall elect to come in and seek relief by contributing to the expenses of this action.

III. That the policy-holders of the said The Hope Mutual Life Insurance Company of New York are very numerous, as these plaintiffs are informed and believe; that some of them are unknown to these plaintiffs, and cannot, with due diligence, be ascertained by them, and many of them are not residents of this State, and that it is impracticable for these plaintiffs to bring them all before the court in this action, and hence the plaintiffs bring this action for

the benefit of themselves and all other policy-holders of said company interested in the fund hereinafter particularly referred to.

IV. That the defendant The Hope Mutual Life Insurance Company of New York is a corporation and was organized as such on or about the thirtieth day of October, 1869, under an act of the Legislature of the State of New York, entitled "An act to provide for the incorporation of life and health insurance companies,
24 and in relation to the agencies of such companies, passed June 24, 1853, and the acts amendatory thereof, for the purpose of carrying on the business of life insurance."

V. That on or about the fifteenth of August, 1871, the said insurance company, for and in consideration of $181.48 paid to the said company and of other good and valuable considerations unto it moving, delivered to the plaintiff Henry E. Reynolds its policy of insurance, whereby it insured the life of said Henry E. Reynolds for the sole use of himself in the sum of $2,000 for the term of ten years from the date of said policy.

That in and by said policy said company covenanted and agreed well and truly to pay or cause to be paid to the said assured or to his legal representatives the sum of $2,000.

That the said Henry E. Reynolds has at all times duly kept and performed the conditions and covenants in the said policy of insurance contained on his part to be kept and performed.

VI. That on or about the twenty-seventh day of December, 1871, the said insurance company, for and in consideration of $151.68 paid to the said company and of other good and valuable considerations unto it moving, delivered to one Moses C. Reynolds, in his lifetime, its policy of insurance, whereby it insured the life of Henry E. Reynolds, son of the said Moses C. Reynolds, for the sole use of the said Moses C. Reynolds in the amount of $8,000 for the term of the natural life of the said Henry E. Reynolds.

That in and by said policy said company covenanted and agreed well and truly to pay or cause to be paid to the said Moses C. Reynolds or his legal representatives the said sum of $8,000.

That the said Moses C. Reynolds died on or about the twentieth day of March, 1878, leaving a will by which the plaintiffs Henry E. Reynolds was appointed executor and Georgiana L. Reynolds executrix thereof.

That thereafter and before the commencement of this action
25 and on or about the sixteenth day of December, 1878, the said will of the said Moses C. Reynolds was duly proved and admitted to probate and letters testamentary thereupon were duly issued to the plaintiffs Henry E. Reynolds and Georgiana L. Reynolds as executor and executrix of said will, and the said Henry E. Reynolds and Georgiana L. Reynolds thereupon duly qualified as such executor and executrix and entered upon the discharge of the duties of their said office.

That the conditions and covenants in the said policy of insurance contained to be kept and performed by the said Moses C. Reynolds have at all times been duly kept and performed on his part.

VII. That on or about the second day of November, 1869, the

said insurance company, for and in consideration of $40.55 paid to the said company and of other good and valuable considerations unto it moving, delivered to the plaintiff Harry A. Wilbur its policy of insurance, whereby it insured the life of Hervey B. Wilbur for the sole use of the plaintiff Harry A. Wilbur in the amount of $1,000 for the term of his natural life.

That in and by said policy said company covenanted and agreed well and truly to pay or cause to be paid to the said Harry A. Wilbur or his legal representatives the said sum of $1,000.

That the said plaintiff, Harry A. Wilbur, has at all times duly kept and performed the conditions and covenants in the said policy of insurance contained on his part to be kept and performed.

VIII. That on or about the thirty-first day of December, 1869, the said insurance company, for and in consideration of $237.80 paid to the said company and of other good and valuable considerations unto it moving, delivered to the plaintiff Hervey B. Wilbur its policy of insurance, whereby it assured the life of said Hervey B. Wilbur for the sole use of the said plaintiff, Hervey B. Wilbur, in the amount of $4,000 for the term of his natural life.

26 That in and by said policy said company covenanted and agreed well and truly to pay or cause to be paid to the said Hervey B. Wilbur or his legal representatives the said sum of $4,000.

That the said plaintiff, Hervey B. Wilbur, has at all times daily kept and performed the conditions and covenants in the said policy of insurance contained on his part to be kept and performed.

IX. That on or about the thirtieth day of December, 1871, the said insurance company, for and in consideration of the surrender and cancellation of a previous policy of insurance in the said company, held by the plaintiffs Robert T. O'Reilly and Elizabeth M. O'Reilly, and of other good and valuable considerations unto it moving, delivered to the said plaintiffs, Robert T. and Elizabeth M. O'Reilly, its policy of insurance, whereby it insured the joint lives of the plaintiffs Robert T. O'Reilly and Elizabeth M. O'Reilly for the sole use of the survivor of the said assured in the amount of $1,000 for the term of the joint lives of said assured from September 22, 1871; that in and by said policy said company covenanted and agreed well and truly to pay or cause to be paid to the survivor of the said assured or his or her legal representatives the said sum of $1,000.

That the said Robert T. O'Reilly and Elizabeth M. O'Reilly have at all times duly kept and performed the conditions and covenants in the said policy of insurance contained on their part to be kept and performed.

X. That on or about the thirtieth day of December, 1871, the said insurance company, for and in consideration of the surrender and cancellation of a previous policy of insurance in the said company, held by Margaret B. Dettmar, one of the plaintiffs, and for the sum of $138, paid to said company, and of other good and valuable considerations unto it moving, delivered to the plaintiff Margaret B. Dettmar its policy of insurance, whereby it insured the life

27 of John F. Dettmar, the husband of said plaintiff, for the sole

use of the said plaintiff, Margaret B. Dettmar, in the amount of $5,000 for the term of his natural life from April 4th, 1871; that in and by said policy said company covenanted and agreed well and truly to pay or cause to be paid to the said Margaret B. Dettmar or her legal representatives the said sum of $5,000.

That the said Margaret B. Dettmar has at all times duly kept and performed the conditions and covenants in the said policy of insurance contained on her part to be kept and performed.

XI. That on or about the seventeenth day of May, 1872, the said insurance company, for and in consideration of $205.80 paid to the said company and of other good and valuable considerations unto it moving, delivered to the plaintiff Elizabeth S. Sprague its policy of insurance, whereby it insured the life of Cortland A. Sprague, the husband of said plaintiff, for the sole use of the said plaintiff, Elizabeth S. Sprague, in the amount of $10,000 for the term of his natural life; that in and by said policy said company covenanted and agreed to pay or cause to be paid to the said Elizabeth S. Sprague or her legal representatives the said sum of $10,000.

That the said Elizabeth S. Sprague has at all times duly kept and performed the conditions and covenants in the said policy of insurance contained on her part to be kept and performed.

XII. That each and every of the said policies of insurance were issued by the said insurance company in its regular course of business and are now in full force and effect, and that the defendant The Hope Mutual Life Insurance Company of New York is liable upon each and every of the said policies to the extent of the value thereof.

XIII. These plaintiffs, on information and belief, further show that when the said The Hope Mutual Life Insurance Company
28 of New York commenced business as such it deposited with the superintendent of the insurance department of this State, as provided by the provisions of the act under which it was organized, one hundred thousand dollars in certain securities belonging to said company as a fund for the protection of its policy-holders, said securities comprising, as the plaintiffs are informed and believe, United States bonds, bonds and mortgages, and cash, being of the value of one hundred thousand dollars.

XIV. That the defendant John F. Smyth is the superintendent of the insurance department of the State of New York, and as such has the sole control and custody of the said securities and fund, and now has and holds the same and every part thereof as a fund for the protection and security of the policy-holders in the said The Hope Mutual Life Insurance Company of New York, with the increase and accumulations thereof and interest thereon which has been collected by the superintendent of the insurance department, and that the said fund, together with the increase, interest, and accumulations thereof, belong to the plaintiffs, the policy holders, to the extent of the value of their respective policies, issued by the said insurance company as aforesaid.

XV. These plaintiffs, on information and belief, further show that on or about the thirty-first day of December, 1872, the defendant

The New Jersey Mutual Life Insurance Company of New Jersey and the defendant The Hope Mutual Life Insurance Company of New York entered into a writing, under seal, purporting to be an agreement whereby, for the consideration therein mentioned, the said The New Jersey Mutual Life Insurance Company undertook to bind itself to reinsure all policies in force issued by the said Hope Mutual Life Insurance Company, and did undertake to obligate itself to assume all liabilities of non-forfeiture on said policies and for guaranteed and endorsed surrender or loan value on all policies issued by said Hope Mutual Life Insurance Company, and did also
29 undertake to assume all liabilities for dividends declared by the defendant The Hope Mutual Life Insurance Company, as well as all policies in force at the date of said agreement, and did undertake to bind itself in general to save, defend, and keep harmless said defendant, The Hope Mutual Life Insurance Company of New York, from all and every liability and all and every suit and suits and from all costs, charges, and expenses that the said company had or might be put to or have incurred on account of any matter or thing connected with or growing out of its business as a life insurance company. In consideration of which the said defendant, The Hope Mutual Life Insurance Company, did undertake to bind itself to transfer, assign, and make over unto the said The New Jersey Mutual Life Insurance Company all the assets, claims, contracts, reinsurances of risks, and all its entire business of every name and nature then possessed, owned, or held by the said Hope Mutual Life Insurance Company, and to make, execute, and deliver any and all transfers, assignments, and conveyances that might be required by the said The New Jersey Mutual Life Insurance Company for the purposes aforesaid; which said agreement was signed by the said insurance companies respectively, and is hereunto annexed, marked Schedule A, and is to be taken and understood as forming a part of this complaint.

XVI. These plaintiffs further aver, on information and belief, that the said insurance companies had no power or authority to enter into said contract; that the said contract is and at the date thereof was wholly null and void, but that if valid it conveyed and transferred to the defendant The New Jersey Mutual Life Insurance Company no interest whatever in the fund and securities on deposit as aforesaid nor in any of the assets or property of the said company, except such as may remain after all the claims of the policy-holders in the said The Hope Mutual Life Insurance Company of New York are satisfied and discharged.

30 XVII. That the said The Hope Mutual Life Insurance Company continued the business of life insurance in the city of New York down to and including the thirty-first day of December, 1872, that being the day and date on which the agreement and transfer aforesaid with the New Jersey Mutual Life Insurance Company was entered into by the said The Hope Mutual Life Insurance Company, and that from and after that date the said The Hope Mutual Life Insurance Company has held and possessed no property or assets of any kind or description and has had no claim or inter-

est in any property or assets whatever except such as it may claim in the fund and securities deposited as aforesaid, and that during all the said period the said company has been and now is wholly insolvent and irresponsible, having and possessing no property or assets of any kind.

XVIII. These plaintiffs further aver on information and belief that it was the object and purpose of the said contract that the said Hope Mutual Life Insurance Company should transfer and part with all its business to the defendant The New Jersey Mutual Life Insurance Company and should thereafter wholly cease to do business as a life insurance company and should forever abandon all its rights and franchises as such company, and that the said The Hope Mutual Life Insurance Company did, on the said thirty-first day of December, 1872, wholly cease to do business as a life insurance company and to issue policies as such, and did wholly abandon its rights and franchises as a life insurance company by neglecting and ceasing to do business as such, and that the said insurance company ever since has and now wholly does refuse and neglect to exercise its rights and franchises and to do business as a life insurance company, and in all things refuses and neglects to comply with the provisions of the statutes of this State regulating and controlling all incorporated companies known as life insurance companies and the business thereof.

31 XIX. The plaintiffs, the policy-holders, therefore claim and allege that they are entitled to receive the amount due on their respective policies of insurance issued to them by the said The Hope Mutual Life Insurance Company out of the fund and securities in the hands of the defendant, the superintendent of the insurance department of the State of New York, and should be paid out of the said fund the value of their said respective policies, and that the respective amounts due to them on their said policies of insurance so issued as aforesaid are a lien on the fund and securities and on all the interests and accumulations thereof in the hands of the said superintendent of the insurance department to the extent of the value of each of their said policies, as the same shall be ascertained and determined by this court.

XX. The plaintiffs, on information and belief, further show that the defendant, the said The New Jersey Mutual Life Insurance Company, has become wholly irresponsible and unable to pay its liabilities, and has, by proceedings duly had for that purpose, been declared insolvent by the chancellor of the State of New Jersey, and that the Hon. Joel Parker, under and in pursuance of an order of the chancellor of the said State, has been duly appointed receiver of the said The New Jersey Mutual Life Insurance Company, and that the said receiver and said insurance company have or claim to have some right or interest in the said fund and securities deposited in the insurance department in this State by the said The Hope Mutual Life Insurance Company, and these plaintiffs pray that the claims and interests of each of the said defendants, whatever they are, may be settled and adjudicated in this action.

XXI. These plaintiffs aver on information and belief that for over

six years last past, to wit, since the thirty-first day of December, 1872, there has been no person or persons who have had the legal authority or power to receive or collect the interest on the
32 fund and securities deposited with the defendant, the superintendent of the insurance department, as aforesaid, by the defendant The Hope Mutual Life Insurance Company, and that the same should have accumulated during the period aforesaid in the hands of the said superintendent of the insurance department, and that, if the said interest and accumulations had been preserved by the said superintendent for the purposes for which said trust was created, the same, together with the said trust fund, these plaintiffs aver on information and belief, would amount now to the sum of at least one hundred and forty thousand dollars, which would belong to and which the policy-holders of the said company, including the plaintiffs in this action, would be entitled to receive to the extent of the value of their said policies respectively, which said last-mentioned sum the defendant, the superintendent of the insurance department, is liable as the custodian thereof to pay to these plaintiffs and to the other policy-holders and beneficiaries entitled thereto to the extent of the value of their said policies respectively.

XXII. The plaintiff John P. Traver, in his own behalf, further shows and alleges that he is a stockholder in the said The Hope Mutual Life Insurance Company of New York; that at and about the time of the making of the contract aforesaid the defendant The New Jersey Mutual Life Insurance Company, in consideration of the transfer to it by John C. Dimmick of one hundred shares of the capital stock of the said The Hope Mutual Insurance Company of New York, of the par value of ten thousand dollars, then held and owned by said Dimmick, issued to the said Dimmick a certificate for his said stock, whereby the said The New Jersey Mutual Life Insurance Company agreed to pay for said stock in the manner set forth in said certificate, which said certificate is hereunto annexed, marked Schedule E, and is to be taken and understood as forming a part of this complaint.

That subsequently and before the commencement of this
33 action the said certificate, together with all the right, title, and interest which the said Dimmick had or could have therein, as well as all the right and interest which he had or could have in the said one hundred shares of the capital stock of the Hope Mutual Life Insurance Company and in any dividends and distributive shares which then or ever thereafter could belong to the said Dimmick or his legal representatives on account of the said stock, was duly assigned and transferred to this plaintiff, and this plaintiff is now the lawful owner and holder of the said certificate and of the said one hundred shares of stock and of all interest, dividends, and distributive shares belonging to the said stock and to the holder and owner thereof in the fund and securities hereinbefore mentioned, as well as in any and all assets belonging to the said company.

XXIII. The plaintiff John P. Traver, in his own behalf, further shows and alleges that he is also the holder and owner of twenty-

four shares of the original capital stock of the defendant The Hope Mutual Life Insurance Company of New York, of the par value of twenty-four hundred dollars; that said stock was duly issued by the said The Hope Mutual Life Insurance Company for a valuable consideration on the twenty-fourth day of January, 1870, and this plaintiff avers and claims that as the owner and holder of such original stock in such company he is rightfully entitled to be paid therefor out of any surplus which may remain of the said trust fund and the accumulations thereof after paying the policy-holders as aforesaid, and that the said surplus will rightfully belong to this plaintiff and to the holders and owners of the rest of the capital stock of the said company after payment of the policy-holders as aforesaid.

XXIV. The plaintiff John P. Traver further alleges in his own behalf that the said The New Jersey Mutual Life Insurance Company have never paid anything whatever for the said stock, and that it has never kept or performed its promises and agree-
34 ments aforesaid with the defendant The Hope Mutual Life Insurance Company, nor with the holder and owner of the said certificate; and this plaintiff avers on information and belief that the said transfer of the said stock to the defendant The New Jersey Mutual Life Insurance Company was absolutely null and void, and that this plaintiff is still entitled to the said one hundred shares of the capital stock of the Hope Mutual Life Insurance Company, which was of the par value of ten thousand dollars, as aforesaid, and is rightfully entitled to be paid therefor, as such owner and holder of said stock, his distributive share out of any surplus which may remain of the said trust fund and the accumulations thereof in the hands of the superintendent of the insurance department after paying the policy-holders aforesaid in the said company.

XXV. The plaintiffs further show on information and belief that the defendant, the superintendent of the insurance department, on a petition signed by himself, has obtained from Justice T. R. Westbrook a paper purporting to be an order directing that it be referred to one William McDermott to enquire into the allegations contained in the petition of the said superintendent, and report, among other things, the names of the persons who are entitled to share in the distribution of the trust fund hereinbefore mentioned, which said paper purporting to be an order bears date the twenty-eighth day of December, 1878, a copy of which and of the said petition of the superintendent are hereto annexed, marked, respectively, Schedules B and C, and are to be taken and considered as forming a part of this complaint.

XXVI. That William McDermott, the person named in the paper signed by Justice Westbrook, as aforesaid, and purporting to be an order, has, in accordance therewith, caused to be published and is now publishing in certain newspapers in the said order mentioned what purports to be a notice to the policy-holders of the said The Hope Mutual Life Insurance Company of New York, signed
35 by him, a copy of which said notice is hereto annexed, marked Schedule D, and it is to be taken and considered as forming part of this complaint.

XXVII. These plaintiffs further show that they are informed and believe that the said proceedings and order instituted and obtained by the defendant, the superintendent of the insurance department, as aforesaid, are wholly unauthorized and without authority of law; that the said order of reference signed by Justice Westbrook as aforesaid was an *ex parte* proceeding, not obtained or entered in any action in any court having before it the parties to whom the said fund and securities belong and are interested, and that it is not a proceeding in which the trust can be finally wound up, nor in which any proper adjudication can be had of the conflicting claims which are made and existing against the said fund and securities, and that it is the purpose and intention of the said superintendent of the insurance department to convert the said securities under the proceedings aforesaid which are held in trust by him for the benefit of the policy-holders of the said insurance company, and in a summary and an unauthorized and unlawful manner to part with, distribute, and dispose of the same unless restrained from so doing by an order of this court.

XXVIII. These plaintiffs further show that it appears from the petition and statement of the defendant, the superintendent of the insurance department, being the same hereto annexed, marked Schedule B, that the total of the fund in his hands deposited by the Hope Mutual Life Insurance Company as aforesaid, with the accumulations thereof, amount at present to only $87,044.61, showing, as these plaintiffs are informed and believe, that there is a deficiency in the said fund and accumulations thereof of about $53,000, which have been wrongfully or unlawfully diverted or parted with and for which, these plaintiffs are informed and believe, the defendant, the superintendent of the insurance department, is liable to the
36 plaintiffs and other policy-holders of the said company, but that if the said superintendent is allowed to distribute the said funds in his hands in the proceedings instituted by him as aforesaid before Justice Westbrook these plaintiffs and the policy-holders of the said company will only receive their distributive share of the said sum of $87,044.61, that being the total of the said fund and the accumulations thereof which the said superintendent, in his proceedings aforesaid, offered or intends to distribute among the policy-holders of the said company.

Wherefore these plaintiffs demand judgment that the defendant John F. Smyth, the superintendent of the insurance department of the State of New York, be adjudged to account for all sums of money, bonds, and securities which were deposited in his hands by the defendant The Hope Mutual Life Insurance Company of New York, and for all interest, increase, and accumulations of the said fund and every part thereof; that the said securities be ordered to be sold by order of this court; that the proceeds thereof be distributed among the plaintiffs and other policy-holders of the said The Hope Mutual Life Insurance Company in the proportion in which they are entitled to the same; that the said The Hope Mutual Life Insurance Company of New York may be dissolved and adjudged by this honorable court to have surrendered and abandoned all its rights, privileges,

and franchises as an incorporated life insurance company, and that after the payment of the policy-holders and creditors of the said company that any surplus that may be left of the said trust fund and accumulations thereof may be distributed among the stockholders of the said company, and that the plaintiffs may have such other, further, or different order or relief in the premises as may be just and equitable, and that the defendant John F. Smyth, the superintendent of the insurance department, his officers, servants, agent, and attorneys, and all other persons acting for or under him, be enjoined from converting the said securities or paying or
37 distributing or parting with the same or any part thereof, except under and pursuant to an order or decree to be entered in this action.

JOHN C. PERRY,
Plaintiffs' Attorney, 346 *Fulton Street, Brooklyn, N.Y.*

Supreme Court.

HENRY E. REYNOLDS, Individually, &c., and Others,
against
JOEL PARKER, as Receiver of the New Jersey Mutual Life Insurance Co., and the said The New Jersey Mutual Life Insurance Co., Impleaded with John F. Smyth and Others.

The defendant Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and the said The New Jersey Mutual Life Insurance Company, for answer to the plaintiffs' complaint say:

1. The Hope Mutual Life Insurance Company of the City of New York was a corporation created as such under and pursuant to the statutes of the State of New York.

2. At or about the time that the said The Hope Company commenced business it deposited with the superintendent of the insurance department of this State, as required by the statutes under which it was organized, certain securities, to the amount in all, as these defendants are informed and believe, of one hundred
38 thousand dollars. Of the particulars of such deposit these defendants have no knowledge or information sufficient to form a belief, but at some time such deposit has consisted of United States bonds, bonds and mortgages, and cash.

3. The defendant John F. Smyth is the superintendent of the insurance department of New York. As such he has the control and custody of the said deposit, and he now has and holds or should have and hold the same and every part thereof, with all increase and accumulations thereof and with all interest which has been collected by his department.

4. To whom such fund, with its increase and accumulation, belongs these defendants are advised is a question of law, depending upon the construction to be given to the statutes in pursuance of which such deposit was made and upon the effect of the various proceedings affecting such deposit. These defendants, however, claim and insist that the same now belongs to the defendant Joel

Parker, as such receiver of the New Jersey Mutual Life Insurance Company.

5. On or about December 31, 1872, there was executed by the said New Jersey Company and by the said Hope Company an instrument by which, as these defendants are informed and believe, all the property and effects of the said Hope Company, including the said deposit and all its increase and accumulations, were transferred to the said New Jersey Company. These defendants believe that a true copy of such instrument is annexed to the complaint, but for greater certainty for the contents thereof they refer to the original when produced.

6. At the time such instrument was executed and such transfer was made the said New Jersey Company was a sound and substantial life insurance company. Whether the said company had the legal right to enter into such a contract these defendants are
39 advised is a question of law, and they ask that the same may be determined by this honorable court, but as a matter of fact these defendants say that in pursuance of such instrument the said New Jersey Company did assume policies of life insurance to the amount of over nine million dollars, and upon such policies and in other ways in pursuance of the provisions of such instrument it has made payments to the amount in all of over $250,000.

7. These defendants maintain that whatever shall be held in reference to the force and effect of the said instrument the same should be maintained as far as is necessary for the protection and indemnity of the said New Jersey Company and its said receiver.

8. The said Hope Company did continue the business of life insurance in the city of New York down to and including December 31, 1872.

9. It was the object and purpose of the said instrument, as these defendants are informed and believe, that the said New Jersey Company should reinsure the said Hope Company, assuming all its risks and taking all its assets, and the said New Jersey Company did, in accordance with such purpose, reinsure the said Hope Company and did assume all its risks. Subsequently the said New Jersey Company did become insolvent and unable to pay its liabilities in full, and by proceedings duly had for that purpose in the court of chancery of New Jersey the defendant Joel Parker was appointed receiver of the said New Jersey Company, and subsequently such proceedings were taken in this court that the defendant Joel Parker, as such receiver, became appointed receiver of the said New Jersey Company in this State, such appointment being ancillary to his appointment in New Jersey.

10. The said New Jersey Company did execute and deliver the certificate, a copy of which is annexed to the complaint, marked Schedule E, the only consideration thereof being the transfer
40 by the said Hope Company to the said New Jersey Company of its assets, as hereinbefore alleged.

11. The defendant, the superintendent of the insurance department, did, upon a petition signed by him, obtain the said order appointing William McDermott referee, and such referee has given the

notice alleged in the complaint. Such proceedings these defendants claim to be wholly unauthorized and without authority of law. The said order of reference was an *ex parte* proceeding not obtained or entered in any action in any court having properly before it the parties to be affected by the proceeding. These defendants acquiesce in the objections to such proceedings, which are set forth in the complaint.

12. As to each and every allegation of the complaint not hereinbefore specifically answered these defendants say that they have no knowledge or information thereof sufficient to form a belief. If it shall appear that either of the plaintiffs was or that either of the plaintiffs represents any one who was, on December 31, 1872, a policy-holder of the said Hope Company or a holder of stock of such company, then, as to such plaintiff, these defendants allege that he or those whom he represents, with full knowledge of the reinsurance by the New Jersey Company of the Hope Company of its assets to the New Jersey Company, as hereinbefore alleged, ratified and confirmed the same and claimed and has enjoyed the benefit of the transaction.

13. Wherefore these defendants ask that it may be adjudged that the said deposit, with its increase and accumulations, belongs to the defendant, the said Joel Parker, as such receiver, and that the same may be transferred to him, and that the defendants may have their costs of this action.

MAN & PARSONS,
Attorneys Defendant Parker, as Receiver, and the N. J. Mutual Life Ins. Co.

41 New York Supreme Court, Kings County.

HENRY E. REYNOLDS Individually and HENRY E. REYNOLDS as Executor and Georgiana L. Reynolds as Executrix of the Last Will and Testament of Moses C. Reynolds, Deceased; Henry B. Wilbur, Henry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Dettmar, Elizabeth S. Sprague, and John P. Traver, Plaintiffs,

against

JOHN F. SMYTH, as Superintendent of the Insurance Department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company, and the said The New Jersey Mutual Life Insurance Company, Defendants.

The separate answer of John F. Smyth, as superintendent of the insurance department of the State of New York, one of the defendants above named, to the complaint of the plaintiffs herein, respectfully shows and alleges as follows:

First. That said defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth paragraphs of said complaint, and therefore he denies the same.

42 Second. That the said defendant admits that certain securities were deposited by the Hope Mutual Life Insurance Company of New York with the superintendent of the insurance department at the time of the organization of said company, and said defendant alleges that said securities were of the nominal or face value of $100,000.

Third. That said defendant admits that, as superintendent of the insurance department of the State of New York, he has the sole control and custody of the said securities and fund and now holds the same as a fund for the protection and security and for the benefit of the policy-holders in the said Hope Mutual Life Insurance Company; but said defendant alleges that he has not sufficient knowledge or information to form a belief as to who are the policy-holders or as to whether said plaintiffs have any right, title, or interest in or to said fund, and therefore he denies the same.

Fourth. That said defendant has not sufficient knowledge or information to form a belief as to the allegations contained in the fifteenth paragraph of said complaint, and therefore denies each of said allegations, except that said Hope Life Insurance Company did enter into a contract of reinsurance with the New Jersey Mutual Life Insurance Company, but as to the provisions and particulars of said contract defendant John F. Smyth is not informed.

Fifth. That said defendant admits the truth of each and every allegation contained in the sixteenth paragraph of said complaint.

Sixth. That said defendant alleges that if the said plaintiffs are policy-holders in the said Hope Mutual Life Insurance Company that then they are entitled to receive ratably according to their respective policies of insurance the proportionate amount due on said policies of insurance issued by said company out of the fund and securities held by said defendant, Smyth, as superintendent of
43 the insurance department as aforesaid; and defendant further states and alleges that as said funds and securities and the avails thereof belong to the policy-holders in said Hope Mutual Life Insurance Company, and that said policy-holders are entitled thereto and to the whole thereof, save what is actually necessary to expend in the conversion and distribution of said fund, he caused to be presented to the supreme court of this State a petition, a copy of which is annexed to the said complaint, asking for the aid of the court to enable him to determine who were the policy-holders in said Hope Mutual Life Insurance Company and in what proportionate share each of said policy-holders is entitled to said fund and any further or other matter or information which would enable said defendant, as superintendent as aforesaid, to distribute said funds in a just and equitable manner to those entitled to the same without the unnecessary delay and great expense of a multiplicity of actions at law.

Seventh. That said defendant alleges, upon information and belief, that said New Jersey Mutual Life Insurance Company has become wholly insolvent, and that Joel Parker has been appointed receiver thereof, and that said receiver claims to have some interest in or right to said fund; but defendant denies that said New Jersey

Mutual Life Insurance Company or the receiver thereof has any right, title, or interest in said fund.

Eighth. That said defendant alleges that the securities deposited with the superintendent of the insurance department as aforesaid have been preserved and carefully guarded for the purposes of the trust by him since the date of his assuming the duties of the office of superintendent of the insurance department, namely, February 22, 1877.

Ninth. That said defendant has not knowledge or information sufficient to form a belief as to the allegations contained in the twenty-second, twenty-third, and twenty-fourth paragraphs
44 of said complaint, and therefore denies each and every allegation in said paragraphs contained.

Tenth. That said defendant alleges that the petition signed by himself, heretofore mentioned, was presented to Hon. T. R. Westbrook, one of the justices of the supreme court of this State, at special term, and after hearing counsel on behalf of said defendant and the attorney general of this State in person the said justice granted the order, a copy of which is annexed to the said complaint, and which with the said petition are therein referred to as Schedules "C" and "B" respectively, and that William McDermott, who in said order is named and by said order was duly appointed referee for the purpose therein mentioned, has proceeded, as said defendant is informed and believes, to carry out the requirements and provisions of said order.

Eleventh. That said defendant, furthor answering said complaint, states and alleges that he is advised and believes that the proceedings above referred to are authorized by and in strict conformity with the law of the State of New York, and that said proceedings are for the purpose of aiding the said superintendent in ascertaining who are the persons entitled to share in the distribution of the avails of said fund and of bringing such persons before the court in order that the rights of each of the said policy-holders may be determined in or to said fund, and that the same may be distributed in a just and equitable manner; and said defendant alleges that it is his duty, as superintendent of the insurance department, to collect said securities and distribute the avails thereof to the policy-holders, but he denies that it his intention to part with, distribute, or dispose of the same in a summary, unauthorized, or unlawful manner; and said defendant further alleges that, as he is informed and believes, he, as superintendent of the insurance department, "has full author-
ity to collect as well as distribute the avails of the securities,
45 and that it is clearly more in accordance with the purpose for which these securities were deposited that they should be collected and disposed of by the superintendent of the insurance department, upon whom is enjoined the especial duty of guarding and protecting the rights of policy-holders as well as creditors," than that they should be wasted by fruitless litigation.

Twelfth. That said defendant alleges that no part of said fund or the accumulations thereon have been wrongfully or unlawfully directed or parted with, but that the same have been preserved and

carefully guarded during his administration of the office of superintendent of the insurance department, and that hereto annexed is a schedule, marked "A," showing in detail the condition of said fund, with the amount now on deposit with said superintendent for the benefit of policy-holders of the Hope Mutual Life Insurance Company of New York, and that said schedule is to be considered as part of this answer,

Thirteenth. And the said defendant, for further answer to the complaint of the plaintiffs herein, alleges that although the facts stated in said complaint are not sufficient to constitute a cause of action, as he is advised and believes, yet he answers and says that every proceeding which has thus far been had towards the conversion and distribution of the securities held by said defendant, as superintendent for the benefit of the Hope Mutual Life Insurance Company of New York, has been taken under the advice of counsel and with the approval of the attorney general of this State, in accordance with the laws and decisions of the courts of this State, and that said proceedings so taken will, in the opinion of this defendant, best protect the policy-holders and those interested in said fund, and will tend to a more speedy and economical distribution of said fund to those entitled thereto than any other course that can be pursued. Wherefore the said defendant, John F. Smyth, as
46 superintendent of the insurance department, demands a dismissal of said complaint with costs.

HARRIS & RUDD,
Atty's for Def't John F. Smyth, Sup't,
29 N. Pearl St., Albany, N. Y.

At a special term of the supreme court, held at the court-house, in the city of Brooklyn, the 15th day of January, in the year 1880.
Present: Hon. Jasper W. Gilbert, justice.

HENRY E. REYNOLDS Individually and HENRY E. REYNOLDS as Executor and Georgiana L. Reynolds as Executrix of the Last Will and Testament of Moses C. Reynolds, Deceased; Harvey B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Dettmar, Elizabeth S. Sprague, and John P. Traver, Plaintiffs,

against

JOHN F. SMYTHE, as Superintendent of the Insurance Department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company, and the said The New Jersey Mutual Life Insurance Company, Defendants.

This action being reached in its regular order for trial,
47 the plaintiffs appearing by John C. Perry, Esq., the superintendent of the insurance department of the State of New York and the attorney general of the State appearing by Hamilton Harris, Esq., and Joel Parker, as the receiver of the New Jersey Mutual Life Insurance Company, appearing by Jno. E. Parsons,

Esq., there being no other appearances, and all parties consenting—

It is ordered that it be, and it is hereby, referred to James W. Husted, Esq., of the city of New York, counselor-at-law, to enquire into and report his findings upon all the issues of fact and to report his opinion upon all the questions of law raised by the pleadings and which shall be raised by or upon any claims which shall be made before him in pursuance of the other provisions of this order; and, further, to take proof and ascertain the condition, amount, and numbers of the securities constituting the fund held in trust by the superintendent of the insurance department, and to take proof and ascertain from the books, records, and papers of the said company or otherwise the persons or parties entitled to share in the distribution of the said securities, the number of policies outstanding in force, the names in which the same were issued, and the persons who are now entitled to the benefit of distribution under the same; also to take proof and ascertain the value of each of said policies, and what sum is due and owing upon each of said policies and to other persons presenting claims before the said referee, and the proportionate share of the avails of said securities so held in trust by said superintendent which each of said policy-holders and claimants is entitled to receive according to law from said superintendent in the distribution of the avails of said securities so held by him.

And it is hereby further ordered that John A. Mortimore or some other suitable person be, and he hereby is, appointed as an actuary, whose duty it shall be to aid and assist the said referee in ascertaining the value of each of said policies and in such other ways as the said referee may require.

48 And it is hereby further ordered that if there should be a surplus arising from the avails of said securities after the distribution of the same among the policy-holders and claimants as their rights may be determined by the court upon the coming in of the report of the said referee, then such residue of said fund shall be paid by the superintendent as the court shall hereafter determine.

And it is hereby further ordered that if the avails arising from said securities be insufficient to pay the aggregate amount that shall be ascertained to be due and owing such policy-holders and claimants in full, then that the said superintendent shall distribute the avails of the said securities among the persons or parties entitled thereto *pro rata*.

And it is further ordered that the said referee give notice of his appointment and of the time when and place where proofs concerning all policies and policy-holders and all claims made against the said fund are required to be presented, by publishing the same twice in each week for four weeks in the State paper and in the Brooklyn Daily Eagle and in the New York Evening Post; that the said referee continue to receive and take such proofs for three successive months thereafter, at the end of which time the case shall be closed, and the said referee shall thereupon make his report to this court with all convenient speed.

And it is hereby further ordered that the said referee may sit and

conduct the proceedings before him as such referee in the city of New York.

And it is hereby further ordered that the report of the said referee, when ready, shall be presented to the court for confirmation and for determination of all questions upon notice to the attorneys of all parties who shall appear upon the reference, with liberty to any party to file exceptions thereto according to the rules and practice of the court.

And it is hereby further ordered that the reference heretofore made to William McDermott, Esquire, as referee, by an order made on December 28th, 1878, at the special term of this court, in
49 Ulster county, in the matter of the Hope Mutual Life Insurance Company of New York, on the application of the said superintendent, be, and the same hereby is, merged in the reference hereby ordered, and that thereafter proceedings under that order be wholly taken in this action, it being further ordered that the said order is wholly superseded by this order, and that in so far as the said order requires things to be done which are not required to be done by this order the said order shall go for naught.

And it is hereby further ordered that the expense of this and of the proceeding in which the said other order of reference was made be fixed and determined upon the coming in of the report of the said referee.

And it is hereby further ordered that the said referee be, and he hereby is, authorized to employ such assistance and clerks as shall be necessary to aid him in performing his duty under this decree, and that the defendant, the superintendent of the insurance department of the State, be, and he hereby is, directed to pay out of the said trust fund the expenses and disbursements which may be necessarily incurred by the said referee and the actuary in performing their respective duties under this decree, upon the requisition and certificate of the said referee that such expenses and disbursements have been necessarily incurred in the performance of said duties, and that he take proper vouchers therefor; and it is further ordered that the said referee include in his report the proper allowances to be made to the respective attorneys and counsel engaged herein.

Copy.

CHAS. B. ELLIOTT, *Clerk.*

50 Supreme Court, Kings County.

HENRY E. REYNOLDS *et al.*
against
JOHN F. SMYTH, as Superintendent, &c., *et al.*

This action having been tried before me, without a jury, at a special term of this court, held at the court-house, in Brooklyn, on the — day of January, 1884, I now hereby file this decision upon the matters of fact and law involved therein:

1. The Hope Mutual Life Insurance Company is a corporation

organized at the time and for the purposes alleged in the fourth paragraph of the complaint.

2. That said company deposited with the superintendent of the insurance department various securities as a fund for the security of the policy obligations, which securities have been from time to time changed, and that at the commencement of this action there remained in said fund money, bonds secured by mortgage, and other securities, aggregating about $87,530.22, and that the defendant Smyth was superintendent at the commencement of and during a part of the pendency of this action.

3. That said company began business soon after its organization and continued the same until December 31st, 1872, during which time it issued nearly sixteen thousand policies of life insurance, — which those mentioned in "Schedule Aa," attached to the report of James W. Husted, Esq., filed June 20th, 1883, together
51 with those hereinafter described by numbers, were outstanding at said last-mentioned date.

4. That on the 25th of May, 1872, said company entered into an agreement with another life insurance company, organized under the laws of this State, known as the Craftsmen's Life Insurance Company, whereby it in form undertook to reinsure in bulk all risks in consideration of certain sums to be ascertained by certain means therein provided, it being understood at the same time that said Craftsmen's Company should cease to do business as a life insurance company, which agreement thereafter was adjudged to be void as in excess of the power of said corporations and as a fraud upon the stockholders of said Craftsmen's Company, and that under said agreement said Hope Insurance Company became liable to pay one Fisher the sum of about $1,200.00 in consequence of insurance upon his life and the receipt of premiums therefor, and that a judgment was recovered against said Hope Company in the superior court of New York city upon said liability; that an appeal was taken from said judgment to the court of appeals and thereon an undertaking was filed in order to perfect said appeal, in which undertaking J. H. Stedwell was one of the sureties; that said judgment was affirmed by the court of appeals and said Stedwell then became liable to pay and there was recovered against and from him on his said undertaking $1,248.24 about August 14th, 1879.

5. That on said 31st day of December, 1872, said Hope Company entered into an agreement in writing with the New Jersey Mutual Life Insurance Company, a corporation of that name then existing under the laws of the State of New Jersey, whereby in form it assigned and transferred to said New Jersey Company all its assets and property in consideration of an agreement to assume all its obligations and to reinsure in bulk all its outstanding insurance risks, which assets, independently of its interests in said fund,
52 amounted to the sum of $530,075.94 and were of that value; that said contract was effected without the knowledge or assent of all the stockholders or policy — or other creditors of said company and never has been ratified by all of said stockholders, policy-holders, or other creditors; that said agreement was effected

by means of the purchase by parties interested in said New Jersey Company and those acting for them of the majority of the capital stock of said Hope Company, and in the personal interest of its officers and a majority of its directors who executed said contract, and was in fact seriously injurious to the stockholders, policy-holders, and other creditors of the said Hope Company, and that it was intended by each of said companies and by the officers and directors through whom said contract was effected that said Hope Company should cease to do insurance business and abandon the purpose of its organization; that thereafter and in pursuance of said contract said officers and trustees did deliver to and said New Jersey Company did take and has ever since kept all of said assets and property save that which constituted said fund in the insurance department.

6. That said Hope Company thereupon ceased business, gave up and refused to maintain any office for the transaction of business, and notified its policy-holders to that effect, and requested them to pay their premiums to the said New Jersey Company, and in pursuance of said notice many of said policy-holders did pay premiums to said New Jersey Company, the aggregate of which exceeded the sum of ($300,000) three hundred thousand dollars.

7. That prior to the year 1876 said New Jersey Company became and thence remained insolvent, and thereafter and on or about the 8th day of February, 1877, the chancellor of the State of New Jersey, having jurisdiction in that behalf, appointed the defendant Joel Parker a receiver thereof and of its assets and property
53 under the laws of said State relating to insolvent corporations and to the winding up of their affairs, and thereafter and on the 20th day of March, 1877, the said Joel Parker was appointed a receiver of the assets of and property of said New Jersey Company in this State by an order of this court in an action pending against said company, and that he has ever since been and still is acting in that capacity.

8. That after said contract with said New Jersey Company it solicited Hope policy-holders to exchange their policies for its own policies, and many of the policy-holders of said Hope Company voluntarily abandoned their policies therein, and in lieu thereof voluntarily accepted policies issued by said New Jersey Company; that it prepared and tendered to Hope policy-holders, upon the occasion of payments of premiums, a paper called a "contract renewal," which purported to witness an agreement that its obligation was substituted for the liability of the Hope Company on the policies therein referred to, and in many cases these papers were taken by policy-holders without giving up their policies; that the New Jersey Company also purchased divers policies from policy-holders of said Hope Company, who thereupon respectively assigned the same to said New Jersey Company; particular description of which policies so assigned is given in schedule marked Cc, attached to said report, except as hereinafter stated; that among the policies delivered to said New Jersey Company and for which its policies were exchanged were those bearing numbers 9133, 8694, 8721, 7422, 9583, and 7979, to the holders of each of which the said New Jersey

Company, at the time of said exchanges, made false and fraudulent statements, upon which they severally relied and acted and were thereby misled in making said exchanges to the effect that it was a strong and solvent company when in fact it was weak and insolvent; that the policy of said Hope Company numbered 7979 was outstanding against said Hope Company upon the life of the person therein specified in favor of his wife, who was the lawful
54 holder thereof, the husband having the custody thereof, but no authority to surrender, assign, or exchange the same; that said New Jersey Company, upon like fraudulent representation and upon like state of actual facts, applied to said custodian, who, relying and acting thereon and being misled thereby, without the knowledge or consent of said holder, delivered the same to said New Jersey Company and accepted its policy in its place; that each of said persons who thus received said policies, upon discovery of the insolvency of said New Jersey Company, respectively elected to rescind the transaction, and the said holder of No. 7979, upon discovery of the fact that her said policy had been so delivered, repudiated the said transaction and never thereafter ratified the same, but returned said New Jersey policy to said receiver.

9. That annexed hereto is a list of policies of said Hope Company which are still outstanding and which ought to be added to the list contained in said Schedule Aa.

10. That said policies indicated by said Schedule Aa, together with those contained in the list hereto annexed and those contained in schedule attached to said referee's supplemental report to be added to said Schedule Aa, are the only outstanding policies of said Hope Company, whose holders have appeared in this action.

11. That the said New Jersey Company, after the said reinsurance agreement, paid certain obligations of the said Hope Company which had matured at that time.

12. That on the 28th of December, 1878, the defendant Smyth presented the petition to this court, and obtained the orders thereon, which are respectively attached to the complaint.

13. That the plaintiffs are respectively stockholders and
55 policy-holders of said Hope Company, as alleged in the complaint.

14. That the following persons, besides the stockholders last aforesaid, were and still are stockholders of said Hope Company, holding and owning the number of shares respectively specified, of the par value of $100 each, and are the only stockholders who have appeared as such in this action—that is to say, James O'Brien, twenty-four shares.

15. That the following persons are general creditors of said Hope Company, which is indebted to them respectively in the sums herein specified, and they are the only general creditors who have appeared in this action—that is to say, John L. Hill, $1,683; S. A. & D. J. Noyes, $2,500; John J. Anderson, $440.

16. That the divers sums of money have been from time to time paid out of said fund since the commencement of this action for expenses thereof amounting to $10,678.11, besides $2,258.10, leav-

ing a balance in said fund of cash and securities aggregating to $66,967.70 on June 12th, 1883.

My conclusion of law and directions for decree are as follows:

First. That said fund ought to be converted into money by the superintendent of the insurance department with all reasonable speed.

That the same is applicable, first, to the lawful expenses of the distribution thereof, to be fixed and determined by the final judgment in this action.

3. That the balance thereof should be applied to the payment of the claims of the persons who hold policies of said Hope Company and who shall be included in the schedule to be prepared in pursuance of the interlocutory judgment hereon.

56 4. That the residue thereof, if any shall remain, should be applied to the payment of said general creditors of said company.

5. That the surplus, if any should remain, shall be distributed *pro rata* among the stockholders who are hereinbefore named.

6. I do not now determine the propriety of the payment of expenditures from said funds, but hold that the accounts of said referee shall be submitted to the referee appointed by the interlocutory judgment to be entered hereon for his examination and report, and the order made herein June 24, 1882, so far as it appoints a referee, shall be vacated, but otherwise continued in force.

7. That the interlocutory judgment shall provide that it be referred back to the same referee (Husted) from day to day, and give notice of these findings and said decree to the parties who have appeared herein or their attorneys, and perform the following duties, with power to sit in New York or Kings county, and shall make report within thirty days from the entry of this decree—that is to say, first, he shall prepare a new schedule, which shall contain in the first column the numbers of all policies contained in Schedule Aa and those which are hereby directed to be added thereto, arranged in numerical order; in the second column the names of the persons entitled to receive a distributive share of said fund, and the third column the sum representing the value or basis upon which each policy is entitled to rank as a creditor in the distribution.

Second. Being satisfied from the evidence that some of the policies represented by C. C. Higgins, Esq., were at one time in the custody of the New Jersey Company, but being unable to distinguish which of them were so possessed by it, I direct said referee to inquire and determine which, if any, of the policies represented by Mr. Higgins before Mr. Husted, as referee, so far as they are

57 now included in Schedule Aa, were surrendered to or have been in the custody of said New Jersey Company, and I direct that he shall place each one which has not been transferred to said New Jersey Company in its appropriate place on said new schedule.

Third. He shall state an account between said New Jersey Company and said Hope Company, in which he shall charge the former with $530,075.94, together with the aggregate amount of premiums

which it collected upon said Hope Company's policies whose holders did not finally accept the said New Jersey Company, either by voluntarily accepting its policies or by making claim for matured insurance money against it, from which sum he shall deduct all sums which were actually paid by said New Jersey Company for debts other than outstanding policy obligations which existed December 31, 1872, and the value of the policies of the Hope Company transferred to and owned by said New Jersey Company. If balance shall appear in favor of said New Jersey Company he shall add its name and the amount of said balance to the said schedule of distributees of said fund; otherwise he shall omit the same from said schedule.

8. That a referee be appointed, who shall carefully examine the accounts and report to the court as to the employment of clerks, assistants, and actuaries and the services required or performed by them and the said value thereof and what is a proper compensation therefor; also the payments already made, from what source, and for what purpose and authority therefor; also the services performed by the referee, Mr. Husted, and the value thereof; also what allowance shall be made to the plaintiff by way of costs or compensation or to any other person claiming pay for services herein. The referee may employ a stenographer, who will accept such compensation as the court shall allow, but he shall furnish but one copy of the testimony at the expense of the fund, and no allowance will be made for printing testimony.

58 8½. I also hold that the policies hereinbefore referred to as including those to be added to the new schedule are the only policy-holders entitled to participate in the distribution of said fund.

9. That policies numbered 9133, 8721, 7422, and 9583 and 7979 were never lawfully obtained by said New Jersey Company, and that they are still outstanding, and that their owners are entitled to participate in said distribution.

10. That the value of each policy shall be computed with reference to all payments thereon, whether to the Hope or New Jersey Company, irrespective of contract renewals.

11. That all policy-holders who voluntarily surrendered their policies to said New Jersey Company and accepted its policies, or who finally made claim against it for insurance company on Hope policies, thereby elected to abandon the Hope Company as an insurer and accepted the New Jersey Company in its place.

12. That the reinsurance agreement between the Hope and New Jersey Companies was in excess of the lawful power of the Hope Company, and was fraudulent and void as against the policy-holders and stock-holders who are herein permitted to rank against said assets for distribution.

13. That the said reinsurance agreement between said Hope Company and said Craftsmen's Company was also void, and in and of itself imposed no liability upon the Hope Company in favor of the Craftsmen's policy hereinbefore referred to.

14. But that, by reason of the judgment in favor of said Fisher, said Hope Company is estopped to deny its liability as upon an in-

surance contract, and that said Stedwell was entitled to a standing as a beneficiary of said trust fund as though he had held its
59 matured policy of the value of $1,248.24, and that his claim should be included in the new schedule hereby required.

16. I do not now pass upon the application of any applicant for costs, allowance, or compensation for services, but reserve the same for determination after the report of the last-named referee, until the interlocutory judgment shall have been filed.

C. E. P., *J.*

At a special term of the supreme court, held at the court-house, in Brooklyn, N. Y., —— —, 1884.

Present: Calvin E. Pratt, justice.

HENRY E. REYNOLDS *et al.*
against
JOHN F. SMITH, Imp., *et al.*
} Interlocutory Judgment.

This cause having been heard at a special term of this court, held by Calvin E. Pratt, one of the justices of this court, without jury, and his decision having been herewith filed—

It is now ordered, adjudged, and decreed that the funds in the hands of the superintendent of the insurance department of this State, deposited by the Hope Mutual Insurance Company, shall be converted into money with all practical speed consistent with the realization of the value of the securities of which it is part composed, and that the said superintendent shall then pay therefrom any sum which may be directed to be paid therefrom by the final judgment in the court for costs, allowances, or other expenses
60 in this action, and the residue thereof shall be distributed to and among those holders of said company's policies, and those who stand in the relation of holders of its policies are indicated by the findings herein to be entitled to participate therein, *pro rata* according to the value of their policies and claims until such claims are satisfied, and that the residue thereof, if any shall remain, shall be distributed *pro rata* to the general creditors of said company, who are specified in said findings, until their claims are paid, and that the surplus, if any remain, shall be distributed *pro rata* among the stockholders of said company, who are mentioned in said findings; and to the end that the names and claims of said distributees may be definitely known it is also further ordered, adjudged, and decreed that it be referred back to said J. W. Husted, referee, who shall have the power and who is hereby directed to prepare a schedule of said distributees upon the principles and according to the directions given in the annexed conclusions of law and directions for this decree.

It is further ordered, adjudged, and decreed that said referee shall forthwith proceed and perform his said duties as indicated by said directions, which are hereby made a part of this judgment. It is also ordered, adjudged, and decreed that the order made in this cause June 24, 1882, so far as it directs a reference, is hereby vacated, but in other respects it is continued in full force, and that all

applications for costs, allowances, compensation, and expenses are hereby reserved and shall be heard and determined by the court upon exceptions after the filing of the report of the referee hereby appointed.

It is also ordered that it be referred to Samuel F. Prentice, Esq., as referee, to examine, take proof, and report upon all payments made by the superintendent of insurance in the course of those proceedings, and the cause and wherefore, and what further sums, if any, should be paid from said fund, and to whom, for costs,
61 allowances, expenses, and compensation of or in these proceedings in according with the findings herein upon these matters.

It is also ordered, adjudged, and decreed that said referee do ascertain and report the condition of said fund at the date of his report, together with the changes in the fund since the commencement of this action (and to that end he may make use of testimony already taken and may take further testimony), and that he also report his opinion whether or not any sums and, if any, what sums have been unlawfully or improperly paid or lost therefrom, and to whom and under what circumstances that they were paid.

62 At a special term of the supreme court of the State of New York, held at the court-house, in the city of Brooklyn, on the 7th day of March, 1885.

Present: Hon. Calvin E. Pratt, justice.

HENRY E. REYNOLDS Individually and HENRY E. REYNOLDS as Executor and Georgiana L. Reynolds, as Executrix of the Last Will and Testament of Moses C. Reynolds, Deceased; Henry B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Dettmar, Elizabeth S. Sprague, and John P. Traver, Plaintiffs,

against

JOHN F. SMYTH, as Superintendent of the Insurance Department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company, and the said The New Jersey Mutual Life Insurance Company, Defendants.

This action having been duly brought to trial at a special term of this court, on the 15th day of January, 1880, on the issues presented by the pleadings herein, and the court, after hearing the proofs and allegations of the several parties and after hearing the respective counsel on their behalf, having made and filed its decision in favor of the plaintiffs, pursuant to which an interlocutory decree was made and filed
63 in the clerk's office of the county of Kings, bearing date the 15th day of January, 1880, by which, among other things, it was ordered that it be referred to James W. Husted, Esq., as referee, to inquire into and report his findings upon all the questions of law raised by the pleadings, and which shall be raised by or upon any claims which shall be made before him in pursuance of certain provisions of said decree, and, further, to take proof and ascertain the

condition, amount, and numbers of the securities constituting the fund held in trust by the superintendent of the insurance department, and to take proof and ascertain from the books, records, and papers of said company, or otherwise, the persons or parties entitled to share in the distribution of the said securities, the number of policies outstanding in force, the names in which the same were issued, and the persons who are now entitled to the benefit of the distribution under the same, and also to take proof and ascertain the value of each of said policies, and what sum is due and owing upon each of said policies, and to other persons presenting claims before said referee.

And was further in and by said interlocutory decre adjudged—

"That if the avails arising from said securities be insufficient to pay the aggregate amount that shall be ascertained to be due and owing such policy-holders and claimants in full, then that the superintendent of the insurance department shall distribute the avails of the said securities among the persons or parties entitled thereto."

And thereafter, on the 13th day of November, 1882, upon due notice to all parties in interest this court modified said first-named order or interlocutory decree in so far as related to the proceedings before said referee, as will more fully appear by reference to said order on file, and therein provided, among other things, and so ordered and directed, that all claims not presented and within the time therein, and as in said order required, would be forever barred from any share or part in the distribution of said fund. And thereafter,

64 on the 20th day of June, 1883, the referee, James W. Husted, having made and filed the report herein, covering all the matters embraced in the several orders of reference made to him, and due notice of the filing of said report having been given to all parties in interest, and objections having been filed to said report by different claimants, the said matter came on to be heard before this court, upon due notice to all parties in interest and by order made upon such hearing, bearing date the 8th day of October, 1883. The said report was referred back to said referee for further action, as in and by said order of file more fully appears, and thereafter, on the 24th and 26th days of November, 1883, while said matter was still pending before said referee, upon due notice to all parties in interest, this court gave further directions to said referee as to certain claims in said orders of file specifically set out.

And thereafter, on the 30th day of November, 1883, the referee, James W. Husted, made and filed with the clerk of this court his report upon the matters referred to him in and by said orders of October 8th and November 24th and 26th, 1883, and thereafter exceptions to the said amended report in the nature of objections were made and filed by various parties in interest, and the argument of said exceptions and of a motion made to confirm the two reports of the referee, James W. Husted, came on regularly to be heard, upon due notice to all parties in interest, before this court on the 8th day of December, 1883, and on subsequent days to which the said motion was duly adjourned; and this court on the 6th day of July, 1884, having filed its decision upon all the matters in controversy and

findings of fact, and made a further interlocutory decree bearing date the 6th day of July, 1884, whereby, among other things, it was ordered that the cause be referred back to James W. Husted, referee, who shall have power and was thereby directed to prepare a schedule of the persons entitled to share in the fund held by the insurance department, upon the principles and according to the directions given in the conclusions of law and directions for decree
65 therein contained, which said interlocutory decree was further modified by the order of this court, on file, dated September 6, 1884; and it was also referred to Samuel F. Prentiss, Esq., as referee, to examine and take proof and report upon all payments made by the superintendent of insurance in these proceedings, and the cause and wherefore, and what further sums, if any, should be paid from said fund, and to whom, for costs, allowances, expenses or compensation of or in these proceedings, in accordance with the findings herein, upon these matters.

And it was further ordered and adjudged that said referee last named do ascertain and report the condition of said fund at the date of his report, together with the changes in the fund since the commencement of this action, and that he also report his opinion whether or not any and, if any, what sums have been unlawfully or improperly paid or loss therefrom and to whom and under what circumstances that they were paid.

And the referee, James W. Husted, having prepared the schedule required of him, and made and filed the same with this court on the 24th day of February, 1885, and a duplicate thereof with the superintendent of the insurance department, giving in numerical order a list of the policies, the name of the person and of his or her attorney of record, and the value or basis upon which each policy is entitled to rank as a creditor—

Whereby it appears that there are 603 claimants, whose aggregate claims amount to $102,880.19; and the said referee, Samuel F. Prentiss, having, on the 24th day of February, 1885, made and filed his report, whereby it appears that there is now in the hands of the superintendent of the insurance department to the credit of this action $52,622.63, and interest at 2½ from June 30, 1884, in cash, and $4,550 par value, but of the market value of $7,450.62 of U. S. 4½ bonds, and a balance of $9,700 and interest from October 30, 1884, at 7 per cent. in bonds and mortgages, making a total of $70,950 (seventy thousand nine hundred and fifty dollars), in addition to the following sums: $1,691.30 to Harris & Rudd, Feb.
66 19, 1881, and $567.30 to William McDermot, Nov. 30, 1881, reported by said referee as improperly paid from said fund.

And various exceptions having been filed to the report of said Samuel F. Prentiss, referee, and to the report of James W. Husted, referee, and the argument of said exceptions and of a motion to confirm each of said reports, and for a decree in substance as this decree having been regularly brought on for hearing before this court—

It is adjudged and decreed—

I. The report of referee, Jas. W. Husted, made and filed herein on the 24th day of February, 1885, and the schedule thereunto annexed,

and all things therein contained, do stand ratified and affirmed as amended by the order of this court, dated March 7, 1885.

II. That the superintendent of the insurance department forthwith convert the U. S. bonds and mortgages held by him, deposited by the Hope Mutual Life Insurance Company, into cash.

III. That, from the funds in his hands, the superintendent of the insurance department retain the sum of 5,997.02 dollars, *the* pay the expenses of executing this order and the sums ordered to be paid for the expenses hereof on the confirmation of the report of Samuel F. Prentiss, referee, amounting to 5,239 dollars 49 cents, exclusive of taxable costs awarded the plaintiffs.

IV. That from the residue of said fund, amounting to 64,814.62 dollars, the superintendent of the insurance department pay, with all convenient speed, to each claimant or his or her attorney, specified in the schedules attached to the report of the referee, James W. Husted, of which the original was filed with the clerk of this court on the 24th of February, 1885, and a duplicate with the superintendent, a dividend of sixty-three per cent. on the valuation in said
67 schedule last set forth as corrected valuation; and where several sums would be due and payable hereunder to a single claimant or attorney, representing one or more claimants, the superintendent may pay the whole sum so due in a single payment on taking a receipt particularizing the claims so paid and the amount received on each.

VII. And it is further ordered that the superintendent of the insurance department file with the clerk of this court, in the county of Kings, within ninety days from the entry and service upon him of a copy of this decree, and serve notice of such filing on the parties to this action or their attorneys of record, a statement showing what acts have been performed by him under and pursuant to this decree.

VIII. And it is further ordered that either party to this action or any person interested in the subject-matter thereof have liberty to apply for further directions on the foot of this decree, and the question of the indebtedness of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and the former superintendent, John F. Smyth, and William McDermott and Messrs. Harris and Rudd, reported by Referee Samuel Prentiss, be reserved.

68 The people of the State of New York, by the grace of God free and independent, to whom these presents may come, Greeting:

Know ye that we have inspected the files and records of our supreme court, at the city of Brooklyn, in the county of Kings,
[SEAL.] — do find a certain decree in Henry E. Reynolds *et al. vs.* John F. Smyth *et al.* remaining there on file of record in the words and figures following, to wit:

At a special term of the supreme court of the State of New York, held at the court-house, in the city of Brooklyn, on the 11th day of October, 1886.

Present: Hon. Calvin E. Pratt.

HENRY E. REYNOLDS Individually and HENRY E. REYNOLDS as Executor and Georgianna L. Reynolds as Executrix of the Last Will and Testament of Moses C. Reynolds, Deceased; Hervey B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Dettmar, Elizabeth S. Sprague, and John P. Traver, Plaintiffs,

against

JOHN F. SMYTH, as Superintendent of the Insurance Department of the State of New York; The Hope Mutual Life Insurance Company of New York; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company, and the said The New Jersey Mutual Life Insurance Company, Defendants.

69

A decree having been entered in this case on the 7th day of March, 1885, wherein it was provided, among other things, as follows:

"And it is further ordered that either party to this action or any person interested in the subject-matter thereof have liberty to apply at the foot of this decree for further directions, and the question of the indebtedness of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and of the former superintendent, John F. Smyth, and William McDermott and Messrs. Harris and Rudd, reported by Referee Samuel F. Prentiss, be reserved."

And the plaintiff in this action, pursuant to the liberty so granted, having noticed a motion for judgment against Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, for the sum of five hundred and thirty-one thousand six hundred and thirteen dollars and ninety-four cents ($531,613,94), with interest on $530,075.94 from the 31st day of December, 1872, and on $1,540 thereof from the 1st day of May, 1877.

And the interest aforesaid having been calculated at seven per centum per annum from December 31, 1872, and May 1st, 1877, to January 1st, 1880, and at (6%) six per centum per annum since the 1st day of January, 1886, and being found to be so calculated to the 11th day of October, 1886, to equal the sum of $478,882.35, and principal and interest together to ($1,010,496.29) one million and ten thousand four hundred and ninety-six dollars and twenty-nine cents:

Now, then, on filing due proof of the service of said motion and the papers therein specified and all the pleadings and proceedings herein, on motion of Charles J. Patterson, plaintiffs' attorney—

70

It is adjudged that the plaintiffs recover of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and against the New Jersey Mutual Life Insurance Company the sum of one million and ten thousand four hundred and ninety-six dollars and twenty-nine cents, the money so recovered, to be brought by the plaintiffs into court and distributed in accordance with the provis-

ions of the original decree herein, and such further directions as may be made by the court herein on the application of any party in interest.

Enter.

C. E. P., *J. S. C.*

All which we have caused by these presents to be exemplified and the seal of our said court for said county to be hereunto affixed.

Witness Hon. Joseph F. Barnard, presiding justice of our supreme court in and for the second judicial department of said State, this 12th day of October, 1886, and in the 111th year of the Independence of the United States.

JOHN M. RANKEN, *Clerk.*

I, Joseph F. Barnard, presiding justice of the supreme court of the State of New York in and for the second judicial department thereof, do hereby certify that John M. Ranken, whose name is subscribed to the preceding exemplification, is the clerk of the county of Kings and clerk of the supreme court in and for said county, and that full faith and credit are due to his official acts.

I further certify that the seal affixed to said exemplification is the proper seal of said court for said county, and that the attestation thereof is in due form of law and by the proper officer.

71 Witness my hand, at the city of Brooklyn, this twelfth day of October, in the year 1886.

J. F. BARNARD,
Presiding Justice of the Supreme Court of the State of New York in and for the Second Judicial Department.

STATE OF NEW YORK, }
County of Kings, } *ss:*

I, John M. Ranken, clerk of the county of Kings, and also clerk of the supreme court of said county in and for the second judicial department of said State (said court being a court of record), do hereby certify that Hon. Joseph F. Barnard, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the second judicial department, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this twelfth day of October, in the year 1886.

[SEAL.] JOHN M. RANKEN, *Clerk.*

72 Supreme Court, Kings County.

HENRY E. REYNOLDS *et al.*, Plaintiffs,
against
JOHN F. SMYTH, Superintendent of the Insurance Department; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company, and Others, Defendants.

CITY AND COUNTY OF NEW YORK, *ss:*

Raphael J. Moses, Jr., being duly sworn, says: I am counsel for the plaintiffs herein. The decree was entered March 7th, 1885, and an appeal taken by the defendant Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, on April 8th, 1885, and the said appeal was dismissed by the order of general term September 21st, 1885, and a copy thereof, with notice of entry, served on the defendant September 24th, 1885; that more than one year has elapsed since the service of said order of dismissal, and no appeal has been taken therefrom to the court of appeals. Deponent has only learned within the last week that the defendant, without notice to him of the application, has obtained an order allowing him to transfer the assets held by him in this State to the receiver of the company in the State of New Jersey; and further deponent sayeth not.

RAPHAEL J. MOSES, JR.

Sworn to before me this 29th day of Sept., 1886.

J. S. MICHAELS,
Notary Public.

73 Supreme Court, Kings County.

HENRY E. REYNOLDS *et al.*, Plaintiffs,
against
JOHN F. SMYTH, Superintendent of the Insurance Department; Joel Parker, Receiver of the New Jersey Mutual Life Insurance Company, and Others, Defendants. } Notice of Motion.

At the supreme court chambers, Brooklyn, at 10.30 a. m., October 7th, 1886.

On the annexed affidavit and the pleadings herein motion will be made for judgment before the Hon. Calvin E. Pratt against Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, for the sum of five hundred and thirty-one thousand six hundred and thirteen dollars and ninety-four cents ($531,613.94), with interest on $530,075.94 from the 31st day of December, 1872, and on $1,540 thereof from the 1st day of May, 1877, and for such other and further relief as may be meet in the premises.

New York, Sept. 29, 1884.

CHAS. J. PATTERSON,
Plaintiffs' Attorney.

RAPHAEL J. MOSES, JR., *Of Counsel.*

74 Supreme Court, Kings County.

HENRY E. REYNOLDS *et al.*, Plaintiffs,
against
JOHN F. SMYTH *et al.*, Defendants.
} Affidavit of Service.

CITY AND COUNTY OF NEW YORK, *ss:*

Arthur S. Luria, being duly sworn, says that he is a clerk in the office of Raphael J. Moses, Jr., and over eighteen years of age; that on the 2d day of October, 1886, at the city of New York, he served the annexed motion papers on Lucius McAdam, Esq., by delivering a copy of the affidavit and notice, of which the annexed is a copy, to the person in charge of his office, at 18 Broadway, and *having* the same with him, the said Lucius McAdam being himself absent at the time, and that on the same day he served the said papers on Gratz Nathan, Esq., at 289 Greenwich street, by leaving a copy of said affidavit and a notice of which the annexed is a copy, in a conspicuous place in his said office, to wit, on his desk, the said Gratz Nathan, Esq., being absent at the time, and that on the same day he served the said papers on William D. Whiting, Esq., at 261 Broadway, by leaving a copy of said affidavit and a notice, of which the annexed is a copy, in a conspicuous place in his said office, to wit, on his desk, the said William D. Whiting being himself absent at the time.

ARTHUR S. LURIA.

Sworn to before me the 2d day of October, 1886.

JOSH. S. MICHAEL,
Notary Public, New York County.

75 CITY OF BROOKLYN,
County of Kings.

Raphael J. Moses, Jr., being duly sworn, says: I am counsel for plaintiff and, as such counsel, attended at supreme court chambers, Brooklyn, on the 7th day of October, 1886, from 10.30 a. m. to 11 a. m., and that the within case — called twice, and no one appeared except a representative from the office of John E. Parsons, Esq., and, at request — said representative, this motion was adjourned to the day Oct. 11th, 1886, at 10.30 a. m., and that deponent again attended supreme court on Oct. 11th, before Hon. Calvin E. Pratt, and waited until 11 a. m., and had said case called, and that John E. Parsons then made default.

RAPHAEL J. MOSES, JR.

Sworn to before me this 11th day of October, 1886.

ROB'T MERCHANT,
Clerk of Court.

Service of a copy of the within affidavit and notice is hereby admitted.

Sept. 29th.

JOHN E. PARSONS,
D. O'BRIEN,
Attorneys General.

Oct. 2d, 1886.

C. C. HIGGINS.

Adjourned to Oct. 11th, at 10.30 a. m., at request of John E. Parsons, no one else appearing.

76 *Agreement.*

Hope Mutual Life Insurance Company of New York and the New Jersey Mutual Life Insurance Company.

This agreement, made this day, hereinafter stated, by and between the Hope Mutual Life Insurance Company of New York, of the first part, and the New Jersey Mutual Life Insurance Company of New Jersey, of the second part, witnesseth:

That the said parties, in consideration of the covenants and agreements hereinafter stated, do hereby mutually covenant and agree each with the other as follows, to wit:

That, for and in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, and for further valuable considerations hereinafter mentioned, the said Hope Mutual Life Insurance Company of New York, party of the first part, does hereby reinsure all policies in force issued by said New Jersey Mutual Life Insurance Company, party of the second part, with the assumption of all liability of non-forfeiture on same and on all policies issued by said company, party of the second part, not renewed, and also assumes all liability for dividends declared by said company, party of the second part, on policies in force at the date of this agreement, and also assume all other liability on said policies.

The said company, party of the first part, also assumes all liability of the said company, party of the second part, for losses unpaid, contested, or otherwise, with all expenses incurred in settlement of same.

Said company, party of the first part, also assume all liability of said company, party of the second part, under contracts with agents, and carry out agreements so made in good faith.

77 Said company, party of the first part, assumes and agrees to pay all claims and indebtedness of the said company, party of the second part, for losses incurred and unpaid, as well as other liabilities, as shown by said New Jersey Mutual Life Insurance Company, party of the second part. Said company, party of the first part, hereby agrees to continue the pay of officers and employees of

said company, party of the second part, to the thirty-first day of December, A. D. 1872, inclusive, whose services shall be rendered to said party of the first part to perfect the transfer of the business of the said party of the second part to said company, party of the first part, said party of the first part to assume the leases of the offices and pay any other liability as may be due by said company, party of the second part.

Said company, party of the first part, also agree with said company, party of the second part, to pay the stockholders of the said company, party of the second part, the amount of capital stock held by them to the amount of one hundred thousand dollars, which sum was actually subscribed for and paid into said company, party of the second part, and will also pay said stockholders above mentioned a bonus of fifty per cent. on said capital stock paid in to, say, the sum of fifty thousand dollars, which sums of one hundred thousand dollars and fifty thousand dollars to be paid said company or stockholders out of the bonds and mortgages now held by said company, party of the second part, as may be agreed upon by both parties to this agreement.

And the said party of the second part, in consideration of the foregoing covenants and agreements herein stated by said company, party of the first part, do hereby sell, transfer, assign, and make over to said party of the first part all the assets, claims, contracts, reinsurances of risks, and entire business of every nature now possessed, owned, and held by said company, party of the second part.

78 In witness whereof we hereby affix our signatures this twenty-eighth day of September, A. D. 1872.

W. E. PLUMMER,
Pres't Hope Mutual Life Ins. Company. [SEAL.]

Witness to the signature of W. E. Plummer, pres't:
J. EDWIN F. BOND.

WM. M. FORCE,
Pres't New Jersey Mutual Life Ins. Company. [SEAL.]

Witness — the signature of Wm. M. Force, pres't:
CHAS. C. LATHROP.

It is agreed that this contract takes effect October 1, 1872.

[U. S. 5-c. rev. stamp, canceled.]

Agreement.

Hope Mutual Life Insurance Company of New York and New Jersey Mutual Life Insurance Company.

This agreement, made this first day of October, 1872, between the Hope Mutual Life Insurance Company, party of the first part, and

the New Jersey Mutual Life Insurance Company, party of the second part, witnesseth:

That said party of the first part, for a valuable consideration to them paid, having reinsured all the policies issued by the said party of the second part and assumed all the debts and liabilities of every kind of the said party of the second part, the said party of the first part, in consideration of the premises and of one dollar to them in hand paid, the receipt of which is hereby acknowledged, have and by these presents do covenant and agree to and with the said party of the second part to save, defend, keep harmless, and indemnify the said party of the second part from all and every suit and suits, claims, and demands whatsoever that may be made or had against them, of and from all costs, charges, and expenses they have or may be put to for or on account of any matter or thing
79 connected with their business or any contract they may have heretofore made relating thereto.

In witness whereof the said party of the first part have hereunto set their corporate seal and caused these presents to be signed by their president the day and year first above written.

W. E. PLUMMER,
Pres't Hope Mutual Life Ins. Co. [SEAL.]

Signed, sealed, and delivered in the presence of—
H. C. ATWOOD.

Agreement.

This agreement, made the thirty-first day of December, A. D. one thousand eight hundred and seventy-two, by and between the New Jersey Mutual Life Insurance Company of Newark, New Jersey, of the first part, and the Hope Mutual Life Insurance Company of New York City, State of New York, witnesseth:

That the said parties, in consideration of the covenants and agreements hereinafter stated, do by these presents hereby mutually covenant and agree each with the other as follows, to wit: That, for and in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, and for further valuable considerations hereinafter mentioned, the said New Jersey Mutual Life Insurance Company of Newark, New Jersey, party of the first part, does hereby reinsure all policies in force issued by said Hope Mutual Life Insurance Company of New York, party of the second part, with the assumption of all liability of non-forfeiture on same and for guaranteed and endorsed surrender or loan value on all polices issued by said Hope Mutual Life Insurance Company of New York, party of the second part, and on all policies issued by said com-
80 pany, party of the second part, not reinsured, and also assumes all liability for dividends declared by said company, party of the second part, on all policies in force at the date of the agreement; and said New Jersey Mutual Life Insurance Company,

party of the first part, also assumes all liability of the said Hope Mutual Life Insurance Company, party of the second part, for all losses unpaid, contracted or otherwise, with all expenses incurred in the settlement of same; and said New Jersey Mutual Life Insurance Company, party of the first part, also assumes all liability of said Hope Mutual Life Insurance Company, party of the second part, for all contracts with agents and agreements so made in good faith.

And said New Jersey Mutual Life Insurance Company, party of the first part, also assumes all liability the said Hope Mutual Life Insurance Company, party of the second part, incurred by virtue and condition of contract and agreement made by said Hope Mutual Insurance Company of New York, party of the second part, with the Craftsmen's Life Assurance Company of New York, whereby the said Hope Mutual Life Insurance Company of New York, party of the second part, reinsured all policies in force issued by said Craftsmen's Life Assurance Company, and assumed other liabilities, which are fully set forth in the agreement made between the said Hope Mutual Life Insurance Company of New York, party of the second part, and the said Craftsmen's Life Assurance Company of New York, under date of May —, A. D. one thousand eight hundred and seventy-two; and the said New Jersey Mutual Life Insurance Company, party of the first part, also assumes and agrees to pay all claims and indebtedness of the said Hope Mutual Life Insurance Company, party of the second part, for losses incurred and unpaid, as well as all other liability, and to save, defend, and keep harmless and indemnify the said Hope Mutual Life Insurance Company of New York, party of the second part, from all and every suit and suits that may be made or had against them *or* and from all costs, charges, and expenses they have or may be put to for or on account of any matter or thing connected
81 with their business or any contract they may have heretofore made relating thereto; and said New Jersey Mutual Life Insurance Company, party of the first part, hereby assumes the leases of offices and any other liability as may be due by said Hope Mutual Life Insurance Company of New York, party of the second part; and said Hope Mutual Life Insurance Company of New York, party of the second part, in consideration of the foregoing covenants and agreements herein stated by the said New Jersey Mutual Life Insurance Company, party of the first part, do hereby sell, transfer, assign, and make over to said party of the first part all the assets, claims, contracts, reinsurances of risks, and entire business of every name and nature now possessed, owned, and held by said company, party of the second part; and the parties further agree that the Hope Mutual Life Insurance Company of New York shall make and execute all such other and further transfers, assignments, and conveyances as may be required by the New Jersey Mutual Life Insurance Company for the purpose of transferring any and all of the property or assets of the Hope Mutual Life Insurance Company of New York to the said New Jersey Mutual Life Insurance Company.

In witness whereof we hereby affix our signatures the day and date hereinbefore mentioned.

[Seal of N. J. M. L. Ins. Co.]

W. E. PLUMMER,
Pres't New Jersey Mut. Ins. Co.

Witness to signature of W. E. Plummer—
E. L. MERRIAM.

JNO. J. ANDERSON,
Sec'y of New Jersey Mut. Life Ins. Co.

Witness to signature of Jno. J. Anderson—
E. L. MERRIAM.

[Seal of H. M. L. I. Co.]

JOHN W. STOUT, JR.,
Vice-Pres't Hope Mutual Life Ins. Co., N. Y.

Witness to signature of John W. Stout, Jr.—
E. L. MERRIAM.

C. H. DEWEY,
Sec'y Hope Mutual Life Ins. Co. of N. Y.

Witness of signature of Chas. H. Dewey—
E. L. MERRIAM.

82 "NEW YORK, *April* 9, 1873.

At a meeting of the board of directors of the Hope Mutual Life Insurance Company of New York held this day, it was—

Resolved, To close up the business of said company, and to that end the president and secretary are instructed to apply, on behalf of said company, to the superintendent of the insurance department of the State of New York for a publication of a notice of the intention of said company to close up its business, as provided by § 19 of chap. 463 of the Laws of 1853 as amended by § 10 of chap. 263 of the Laws of 1859 of the State of New York.

JOHN J. ANDERSON, *Secretary.*"

"*Notice.*"

"STATE OF NEW YORK, INSURANCE DEPARTMENT,
"ALBANY, *April* 11, 1873.

"Whereas the Hope Mutual Life Insurance Company of the City of New York desire to relinquish the business of life insurance and an application dated the 9th day of April, 1873, has been duly made for that purpose to the superintendent of the insurance department of said State by the said company under the oaths of William E. Plummer, the president, and John J. Anderson, the secretary, of the said company, as required by the 19th sec. of chap. 463 of the act entitled 'An act to provide for the incorporation of life insurance companies and in relation to the agency of such companies,' passed June 24, 1853, as amended by the first section of chap. 263 of the Laws of 1859: Now, therefore, notice is hereby given, in conformity with the provisions of the 19th section, that the said Hope Mutual

Life Insurance Company of the City of New York intends to relinquish and discontinue the business of insurance and desires to obtain a surrender and a redelivery to said company of the stocks and securities or a portion of them now on deposit with the said superintendent for the security of the policy-holders of the said company.

"ORLOW W. CHAPMAN,
"*Superintendent.*"

83 EXHIBIT 1 FOR RESPONDENT.

At a special term of the supreme court, held at the court-house, in the city of New York, the 22d day of March, in the year 1886.

Present: Hon. Charles H. Van Brunt, justice.

JACOB VANATTA and WILLIAM GEASA
against
THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY. } Action No. 1.

WILLIAM GEASA
against
THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY, The National Capital Insurance Company of Washington, D. C., Jacob Vanatta, &c., and Others. } Action No. 2.

An order having been made in these actions on the first Monday of January, in the year 1886, referring the account of Joel Parker, as ancillary receiver in this State of the assets of the New Jersey Mutual Life Insurance Company, duly appointed as such in these actions, to the Honorable John T. Hoffman, as referee, to examine and to report thereon, and by the said order the said referee having been directed to ascertain and report what amount should be paid to the said Joel Parker, as such ancillary receiver, for his fees
84 and expenses and what compensation should be made to his counsel for services as such; and the said referee, by his report bearing date March 4, 1886, having reported that a reasonable charge for services rendered to the receiver by John E. Parsons, his counsel, for which compensation had not been made, would be $5,100.86; that the counsel of the receiver had proposed to accept in full for such services $3,592.91, which amount the referee approved and reported should be paid to him; and by his said report the said referee having reported that there should be paid to the said receiver his statutory commission upon the sum of $17,040.59, which had come into his hands; and the said referee having further reported that such commission was inadequate compensation for services of a special character which were rendered by the receiver, and that $1,500 in addition to his commission would, in the judgment of the referee, be moderate compensation for such services.

And it further appearing that of the money which has come into the hands of the said Joel Parker, as such ancillary receiver, the

total amount which remains consists of the sum of $11,733.10, by the receiver deposited in the New York Life Insurance and Trust Company, on April 8, 1880, with accumulations of interest thereon, increasing the amount to $13,872.09—

On reading and filing the report of the said referee and the papers thereto annexed, and on motion of John E. Parsons, of counsel for the said Joel Parker, as such ancillary receiver, it is hereby ordered and directed that the said report of the said referee be, and the same hereby is, in all respects approved and confirmed, and that the account of the said Joel Parker, as such receiver, filed by him herein and submitted to the said referee be, and the same hereby is, in all respects approved and passed.

And it is further ordered and directed that from the said money deposited by the said receiver in the New York Life Insurance and Trust Company there be paid as follows:

To John T. Hoffman, Esq., referee herein, for his fees upon the reference to him, $256.25.

85 To Joel Parker, as such receiver, a commission of five per cent. on the said sum of $17,040.59, being the sum of $852; and in addition thereto the sum of $1,500 as compensation to the said receiver for services of a special character which were rendered by him.

To John E. Parsons, counsel for the said receiver, $3,592.91.

And it is further ordered and directed that the residue of the said money in the hands of the said receiver, and so deposited by him in the New York Life Insurance and Trust Company, be paid to the receiver of the New Jersey Mutual Life Insurance Company appointed by the chancellor of New Jersey, to be disposed of by him according to the direction of the chancellor of that State.

And it is further ordered and directed that the New York Life Insurance and Trust Company may, upon the surrender to it of the certificate of deposit given by it to the said Joel Parker for the money on deposit with it, make either, any, or all of the payments herein directed to be made, or that the said Joel Parker, as such receiver, may withdraw the said money from the said New York Life Insurance and Trust Company and make either, any, or all of such payments himself.

And it is further ordered and directed that upon compliance with this order the said Joel Parker, as such ancillary receiver, be discharged from all liability, and that the bonds given by him upon his appointment as such be, and the same hereby are, discharged.

A copy.

[SEAL.] JAMES A. FLACK, *Clerk.*

It is agreed between counsel that the following appears in the report of Joel Parker, receiver, made by him May 24, 1880:

"On the 7th day of March, A. D. 1877, I was appointed
86 receiver in the State of New York and gave bond in that State. A number of suits have been pending there, some of which have not yet been concluded."

"Subsequently I was appointed receiver in the State of New York, and gave bond there in a large sum."

"Memorandum of N. J. Mutual Life Insurance Company; suits pending in New York.

"Jacob Vanatta and William Geasa against The New Jersey Life Insurance Company. Suit commenced February 26, 1877.

"This is the suit in which Joel Parker was appointed receiver in New York. That was the object of the suit."

* * * * * * *

"Henry E. Reynolds and the executor of Moses C. Reynolds and several policy-holders and stockholders of the Hope Mutual Life Insurance Company against John F. Smyth, as superintendent of insurance department of New York; the Hope Mutual, Joel Parker, as receiver, and the New Jersey Mutual. Suit commenced February 19, 1879.

"This suit is brought to distribute the assets of the Hope Mutual Life Insurance Company and to determine the rights of all the parties to the assets.

"The case came on for trial and was then referred for trial to William McDermott, under an order which permits the insurance department to carry along with it, before the referee, a proceeding for the distribution of the funds deposited by said company with it. It is similar in some respects to the Underhill suit."

87 In Chancery of New Jersey.

Between—

THE ATT'Y GENERAL, Informant,
and
THE NEW JERSEY MUTUAL LIFE INS. CO., Respondent.

On the appeal of Henry E. Reynolds *et al.* from decision of receiver rejecting their claim.

For appellants, A. Q. Keasbey & Sons and Mr. R. J. Moses, Jr., of New York; for the receiver, Mr. F. W. Stevens.

Mem. of Adv. Master.

Assuming, as I think we are bound to do, that the views set forth in Munday *vs.* Vail, 5 Vroom, 418, as to the necessity of proper allegations in the pleadings to justify judicial action are applicable to this case, and accepting the proposition of Mr. Moses in his argument for the appellants that we may take the 2nd, 15th, 16th, 17th, 18th, and 20th paragraphs of the complaint in the New York suit as constituting its material part for the present purpose, I am unable to find therein such allegations as would put the receiver of the N. J. Mutual on his defence in respect to the whole account
88 and controversy between that company and the Hope Life Insurance Co., or any allegations referring at all to it, nor

does the receiver's answer make such an issue or appear to contemplate it.

The whole scope of that suit was to ascertain who were entitled to the fund in charge of N. Y. insurance department and to distribute it. When it was found on the issues made that the N. J. Mutual Co. was not entitled to it, because their agreement with the Hope Co. was unavailing against the Hope Co.'s creditors and the N. J. Co. stood bound by all the rights of those creditors against that fund, and when that fund was accordingly distributed among those creditors, the object of the suit, as defined by the pleadings, was accomplished.

I find no such consent to any further proceedings as would show an intention to be bound by them; nor, if there had been, does it seem that such consent would have been effectual in such a matter or permitted to control this court in its duty of collecting and distributing the assets of the New Jersey Co. according to law.

But it also appears that the receiver, who was a party to the suit and answered, went out of office before the judgment now set up was obtained. It seems clear that a judgment obtained in the absence of any one representing the fund cannot bind its administration here; nor can it be admitted that the presence of the New Jersey Co. in that proceeding would have the effect to make it conclusive here after this court has declared that company insolvent and undertaken to administer its affairs by a receiver, whatever force such proceeding might have in respect to assets found in New York.

In my opinion the claim as presented on the N. Y. judgment ought not to be allowed and the present appeal should be dismissed.

June 10, 1887.

W. B. WILLIAMS, *Adv. Master.*

89 In Chancery of New Jersey.

Between—

THE ATTORNEY GENERAL OF NEW JERSEY, Informant, and THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY, Respondents. } On Information.

Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth M. O. Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver having presented to Robert F. Stockton, the receiver appointed in the above cause, a claim on behalf of the Hope Mutual Life Insurance Company against the New Jersey Mutual Life Insurance Company and Joel Parker, as receiver of said company, for the sum of one million ten thousand four hundred and ninety-six dollars and twenty-nine cents, purporting to be a claim arising out of a final judgment rendered by the supreme court of the State of New York in favor of said claimants against the said The New Jersey Life In-

surance Company and said Joel Parker, as such receiver, for the benefit of said Hope Mutual Life Insurance Company;

And the said Robert F. Stockton, as such receiver, having rejected said claim, and an appeal from his determination having been taken to this court, and the pleadings and proofs taken in said appeal having been read, and the arguments of Edward Q. Keasbey and Raphael J. Moses, on behalf of said claimants, and of Frederick W. Stevens, on behalf of said receiver, having been heard and considered, and the court being of opinion that said claim was properly disallowed by said Robert F. Stockton, the receiver aforesaid—

90 It is, on this seventeenth day of June, in the year 1887, on motion of F. W. Stevens, ordered, adjudged, and decreed that said appeal so taken from said determination be dismissed with costs.

ALEX. T. McGILL, *C.*

Respectfully advised.

WASHINGTON B. WILLIAMS,
Advisory Master.

91 New Jersey Court of Errors and Appeals.

Between—

HENRY E. REYNOLDS and *al.*, Appellants,
and
ROBERT F. STOCKTON, Receiver of the New Jersey Mutual Life Insurance Company, Respondent.

To the honorable the court of errors and appeals in the last resort in all causes:

The humble petition of Henry E. Reynolds, Georgianna L. Reynolds, Hervey B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth H. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John P. Traver, the appellants in the above-stated cause, respectfully shows that your petitioners find themselves aggrieved by an order made in the court of chancery of New Jersey by his honor Alex. T. McGill, Jr., chancellor of New Jersey, bearing date the seventeenth day of June inst., wherein your petitioners were petitioners and Robert F. Stockton, receiver of the New Jersey Mutual Life Insurance Company, was respondent, in this respect, to wit, that the said order adjudges that your petitioners' petition be dismissed with costs.

And your petitioners humbly appeal from the said order on the ground that the same is erroneous, for that it should have been ordered that the said petition should be granted. Your petitioners therefore pray that said order of the chancellor may be reversed, set aside, and for nothing holden, and that your petitioners

92 may have such other relief in the premises as to this honorable court shall seem meet.

A. Q. KEASBEY & SONS, *Solicitors.*
EDW. Q. KEASBY, *Of Counsel.*

In Chancery of New Jersey.

Between—

THE ATTORNEY GENERAL OF NEW JERSEY, Informant, and THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY *et al.*, Respondents.	On Information. Notice of Appeal.

The petitioners, Henry E. Reynolds, Georgianna L. Reynolds, Hervey B. Wilbur, Harry A. Wilbur, Robert T. O'Reilly, Elizabeth H. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John P. Traver, hereby appeal from an order made on the seventeenth day of June, eighteen hundred and eighty-seven, in this court in the above-stated cause, adjudging that the petitioners' petition be dismissed with costs, and from the whole and every part thereof to the court of errors and appeals in the last resort in all causes.

A. Q. KEASBEY & SONS, *Solicitors.*

Dated June 18, 1887.

I conceive there is good cause for appeal in the above-stated cause.

EWD. Q. KEASBEY,
Of Counsel with Petitioners.

93 Court of Errors and Appeals of N. J. June Term, 1887.

Between—

HENRY E. REYNOLDS *et al.* and ROBERT F. STOCKTON, Receiver of the New Jersey Mutual Life Insurance Company.	Appeal.

Syllabus.

1. A decree in New York which adjudicates a matter not presented by the pleadings nor within the issue can have no higher effect than a judgment rendered in our own courts under like conditions. Under the authority of Munday *vs.* Vail, 5 Vr., 413, it must be treated as a nullity.

2. A receiver of an insolvent corporation appointed in this State to administer the assets here has no power to transfer to a foreign jurisdiction any question touching the distribution of such assets. He cannot deprive the court which appointed him of its authority over him and over the fund which he holds as its officer.

3. A judgment obtained in New York in the absence of any one representing the assets cannot bind their administration here, whatever force it might have with respect to assets which may be found there.

94 Court of Errors and Appeals of N. J. June Term, 1887.

Between—

HENRY E. REYNOLDS and Others, Appellants,
and
ROBERT F. STOCKTON, Receiver of the New Jersey Mutual Life Insurance Company, Respondent.
} On Appeal.

Argued at June term, 1887.
R. J. Moses, Jr., Esq., for app'l'ts.
F. W. Stevens, Esq., for respondent.

The opinion of the court was delivered by VAN SYCKEL, *J.*:

The appellants in this proceeding commenced an action in February, 1879, in the supreme court of New York against the Hope Life Insurance Company, John F. Smyth, then superintendent of the insurance department of New York; Joel Parker, receiver, and the New Jersey Mutual Life Insurance Company. Joel Parker was then acting receiver of the last-mentioned company under appointment of the court of chancery of New Jersey, and also ancillary receiver under appointment by the supreme court of New York. It is admitted that the Hope Company was not brought into court by process of summons or otherwise, and that no appearance to said suit was put in by said company.

95 The range and object of that suit as presented by the pleadings was to determine who was entitled to the fund deposited with the New York superintendent of insurance by the Hope Company. The New Jersey Company claimed it under its agreement to reinsure the Hope Company. Joel Parker, as receiver, and the New Jersey Company filed an answer, in which that is the only issue made.

No amendment was subsequently made to the pleadings and no further answer filed by said receiver or said company.

The case was referred, and on the 7th of March, 1885, a decree was made adjudging the relative interests of the parties in the deposit funds.

Before the decree was entered in New York Joel Parker was succeeded by Robert F. Stockton as receiver in New Jersey, but he continued to be ancillary receiver in New York until 1886, when he was discharged there by an order of the supreme court and directed to turn over the assets in his hands to the New Jersey receiver.

On the 11th of October, 1886, after the discharge of the receiver in New York, a further proceeding was taken in the aforesaid suit in New York without in anywise amending the pleadings and without further answer or appearance on the part of Parker, receiver, or the New Jersey Company, in which it was adjudged that the plaintiffs in said proceeding recover of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, the sum of one million and ten thousand four hundred and ninety-six dollars and twenty-nine cents.

This claim was presented to Rebert F. Stockton, receiver of the

New Jersey Company, and by him rejected on the ground that the New York adjudication did not constitute legal proof of the
96 alleged indebtedness. On appeal to the court of chancery the action of the receiver was sustained and the appellants dismissed without relief.

The question presented by the appeal to this court is whether to the decree of the New York court the conclusive force and effect of a judgment must be accorded. That question is distinctly presented in Munday *vs.* Vail, 5 Vr., 418, where it is held by the supreme court of this State that a decree which is entirely aside of the issue raised in the record is invalid and will be treated as a nullity, even in a collateral proceeding. A decree or judgment which is not appropriate to any part of the matter in controversy before the court can have no force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby.

The object of the New York suit was fully accomplished, so far as the pleadings disclosed its purpose, when the New York fund was disposed of. There was an entire absence of such specific allegations in the complaint as were necessary to put the receiver of the New Jersey Company on his defence in respect to the state of the account between that company and the Hope Company.

The decree in New York, having adjudicated a matter not presented by the pleadings nor within the issue, can have no higher effect than a judgment rendered in our own courts under like conditions. Under the authority of Munday *vs.* Vail it must be treated as a nullity.

A further infirmity in the appellants' position is the fact that the New Jersey court had the exclusive right to administer and dispose of the assets which the receiver held in this State. The re-
97 ceiver had no power to transfer to a foreign jurisdiction any question touching the appropriation and distribution of such assets. He could not thus deprive the court which appointed him of its authority over him and over the fund which he held as its officer. If he could change the forum to New York he would have been without restraint — if he had selected the courts of Mexico or China. The issue made by the answer of Receiver Parker to the complaint in New York clearly restricts the inquiry in that case to the disposition of the New York fund. Over that subject the jurisdiction of the foreign court is not challenged. It appears also that Parker was discharged as ancillary receiver in New York, and also was discharged as receiver in New Jersey before the judgment now set up was obtained.

A judgment obtained in the absence of any one representing the assets cannot bind their administration here, whatever force it might have with respect to assets which may be found in New York.

In my opinion the decree below should be affirmed with costs.

98 STATE OF NEW JERSEY, DEPARTMENT OF STATE.

I, Henry C. Kelsey,, secretary of state of the State of New Jersey and *ex officio* clerk of the court of errors and appeals in the last resort in all causes, do hereby certify that the foregoing is a true

copy of an opinion in the above-stated case as the same is taken from and compared with the original now remaining on file in my office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the official seal of said court this third day of September, A. D. 1887.

HENRY C. KELSEY,
Secretary of State.

99 New Jersey Court of Errors and Appeals. June Term, 1887.

Between—

HENRY E. REYNOLDS *et als.*, Appellants,
and
ROBERT F. STOCKTON, Receiver of the New Jersey Mutual Life Insurance Company, Respondent. } On Appeal. Decree.

This cause having been brought to a hearing on an appeal from the court of chancery, at the June term of this court, anno Domini eighteen hundred and eighty-seven, and Raphael J. Moses, Esquire, of counsel with the appellants, and Frederic W. Stevens, Esquire, of counsel with the respondent, having been heard and the questions brought up by said appeal having been duly considered, it is, on this twenty-second day of July, in the year of our Lord one thousand eight hundred and eighty-seven, ordered, adjudged, and decreed that the decree of the court of chancery made on the seventeenth day of June, in the year of our Lord one thousand eight hundred and eighty-seven, which is appealed from by the appellant, be, and the same is hereby, in all things affirmed with costs in this court and in the court of chancery to be paid by the appellant, and that the petition of appeal be dismissed; and it is further ordered that the record be remitted to the court of chancery to proceed further thereon according to law and the practice of said court.

On motion of Frederic W. Stevens, solicitor and of counsel with respondent.

100 STATE OF NEW JERSEY:

I, Henry C. Kelsey, secretary of state of the State of New Jersey and *ex officio* clerk of the court of appeals in the last resort
[L. S.] in all causes, &c., do hereby certify the foregoing to be a true copy of a decree made in the above-stated cause, as the same is taken from and compared with the minutes of said court.

In witness whereof I have hereunto set my hand and affixed my official seal this fifteenth day of September, A. D. 1887.

HENRY C. KELSEY.

101 It is hereby stipulated and agreed that the foregoing is a true transcript of the record and proceedings in the matter of Henry E. Reynolds and others against the receiver of the New Jer-

sey Mutual Life Insurance Company, in the court of chancery, including the proceedings in the court of errors and appeals affirming the decree in chancery.

A. Q. KEASBEY & SONS,
Att'ys of Pl't'fs in Error.
FREDERIC W. STEVENS,
Att'y of Def't in Error.

102 STATE OF NEW JERSEY, *ss:*

I, Allen McDermott, clerk of the court of chancery of the State of New Jersey, do hereby certify the foregoing to be a true transcript of the record and proceedings in the said entitled cause, as the same remain of record and on file in my office at Trenton, including the remittitur from the court of errors and appeals in the last resort and the proceedings thereon in the said court of chancery.

Seal of the Court of Chancery, State of New Jersey.

In testimony whereof I have hereunto set my hand and affixed the official seal of said court this eleventh day of October, A. D. 1887.

ALLAN McDERMOTT, *Cl'k.*

103 To the honorable the justices of the Supreme Court of the United States:

The petition of Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Margaret T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver respectfully shows—

That manifest error hath happened, to the great damage of your petitioners, in the record and proceedings and also in the rendition of a decree in a suit between your petitioners, appellants, and Robert F. Stockton, receiver of the New Jersey Mutual Life Insurance Company, respondent, in the court of chancery of New Jersey, made on the seventeenth day of June, eighteen hundred and eighty-seven, from which decree an appeal was taken to the court of errors and appeals in the last resort in all causes in the State of New Jersey, and which was on said appeal affirmed by said court of errors and appeals, and the record and proceedings in said suit were
104 thereupon, on the fifteenth of September, eighteen hundred and eighty-seven, remitted to the said court of chancery, where the same now remain.

And your petitioners say that, having recovered a judgment in the supreme court of the State of New York against the New Jersey Mutual Life Insurance Company and Joel Parker, as receiver thereof, in New York, for one million ten thousand four hundred and ninety-six dollars and twenty-nine cents in favor of themselves and the other policy-holders and stockholders of the Hope Mutual Life Insurance Company, they presented to the said Robert F. Stockton, the receiver of the New Jersey Mutual Life Insurance Company, duly appointed by the chancellor of the State of New Jersey, in an information proceeding by the attorney general of New Jersey against the said The New Jersey Mutual Life Insurance Company, an in-

solvent corporation, their claim for the allowance out of the funds of the said insolvent corporation in the hands of the said receiver their proper proportion of the assets of the said insolvent corporation in the hands of the said receiver and about seventy-nine hundred dollars of the assets of the said insolvent corporation recovered from the State of New York by the said New Jersey
105 receiver, and also fifteen hundred and forty dollars, interest on a mortgage belonging to the Hope Mutual Life Insurance Company, paid by the insurance department of New York to the said New Jersey receiver by mistake.

And thereupon the said receiver refused to allow said claim and your petitioners appealed from said determination of the receiver to the court of chancery of New Jersey, by petition, to which petition the said receiver filed an answer claiming, among other things, that the said judgment was of no validity against him as such receiver, and that the receiver in New York had no power to bind him by any acts done in the foreign jurisdiction of the State of New York, and that he, the said receiver, had never authorized or consented to the adjudication of the question of the indebtedness of the New Jersey Mutual Life Insurance Company to the Hope Mutual Life Insurance Company by any tribunals other than those constituted by the laws of New Jersey, and that he and the New Jersey Mutual Life Insurance Company still possess the right to litigate *de novo* the subject-matter of the said New York judgment.

106 And thereupon, upon the said petition and answer and the proofs taken, the court of chancery of New Jersey refused to allow the said claim and dismissed the said petition, from which decree of dismissal your petitioners appealed to the New Jersey court of errors and appeals, which court affirmed the said decree of the chancellor and ordered that said appeal be dismissed, and remitted the record of said suit to the said court of chancery, by reason of which affirmance and remittitur the said decree entered in the court of chancery became the final decree in said suit, affirmed by the highest court of the said State in which a decision could be had therein; all which appears in the record and proceedings in said suit.

And your petitioners show that in the said suit or proceeding your petitioners claimed that the said judgment recovered by them in the supreme court of the State of New York against The New Jersey Mutual Life Insurance Company and its receiver appointed under the laws of New York, upon due service, appearance, and answer of the said company and its receiver, was conclusive as
107 against the said company and its receiver in New Jersey, and that the subject-matter thereof could not be litigated *de novo* by the said receiver in New Jersey, and that under the provisions of the first section of the fourth article of the Constitution full faith and credit should have been given in the State of New Jersey to the said judgment of the supreme court of the State of New York.

That the said claim of your petitioners was disputed by the said receiver, and the decisions of the said court of chancery and the said court of errors and appeals, respectively, were against the said

title, right, and privilege specially set up and claimed by your petitioners under the Constitution of the United States.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

A. Q. KEASBEY & SONS,
Attorneys of said Petitioners.

The writ of error hereinbefore prayed for is allowed this 27th September, 1887.

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court U. S.

108 [Endorsed:] Supreme Court of the United States. Henry E. Reynolds and others, plaintiffs in error, *vs.* Robert F. Stockton, receiver of the N. J. Mutual Life Ins. Co., defendant in error. Petition for writ of error. A. Q. Keasbey & Sons, att'ys for pl'ffs in error.

109 UNITED STATES OF AMERICA, *ss:*

To Robert F. Stockton, receiver of the New Jersey Mutual Life Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the office of the clerk of the court of chancery of New Jersey, wherein Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Margaret T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver are plaintiffs and you are defendant in error, to show cause, if any there be, why the decree in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, this 27th day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

109½ Due & legal service of this citation is hereby acknowledged.

F. W. STEVENS,
Sol. of Def't in Error.

110 [Endorsed:] Supreme Court of the United States. Henry E. Reynolds and others, plaintiffs in error, *vs.* Robert F. Stockton, receiver of the N. J. Mutual Life Ins. Co., defendant in error. Citation on writ of error to the court of chancery of New Jersey. A. Q. Keasbey & Sons, att'ys of pl'ffs in error.

111 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the court of chancery of the State of New Jersey, Greeting:

Because in the record and proceedings and also in the rendering of a decree in a suit before you or some of you, entered on the seventeenth day of June, eighteen hundred and eighty-seven, and afterwards affirmed by the court of errors and appeals in the last resort in all causes in the said State, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Margaret T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver, plaintiffs in error, and Robert F. Stockton, receiver of the New Jersey Mutual Life Insurance Company, wherein was drawn in question the construction of the first section of the
112 fourth article of the Constitution of the United States and the decision was against the title, right, and privilege specially set up and claimed under such clause of the Constitution, a manifest error hath happened to the great damage of the said Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Margaret T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver, as by their complaint appears, we, being willing that the error, if any there be, should be corrected in due manner and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, you do, distinctly and openly, send the record and proceedings in the suit aforesaid, with all things concerning them, and this writ, so that you may have the same at Washington on the second Monday of October next in the said Supreme Court, to be then and there held, that, the record of the proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

113 Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

The Seal of the U. S. Circuit Court, Dist. of New Jersey.

S. D. OLIPHANT, *Clerk.*

114 [Endorsed:] Supreme Court of the United States. Henry E. Reynolds and others, plaintiffs in error, *vs.* Robert F. Stockton, receiver of the N. J. Mut. Life Ins. Co., defendant in error. Writ of error to court of chancery of New Jersey. Returnable October term, 1887. A. Q. Keasbey & Sons, attorneys. Allocatur, Sep. 27, 1887. Joseph P. Bradley, asso. justice Sup. C't U. S.

115 Supreme Court of the United States.

HENRY E. REYNOLDS, GEORGIANNA L. REYNOLDS, HENRY B. Wilbur, Harry A. Wilbur, Margaret T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver, Plaintiffs in Error,

vs.

ROBERT F. STOCKTON, Receiver of the New Jersey Mutual Life Insurance Company, Defendant in Error.

Know all men by these presents that we, Charles L. Borgmeyer and James L. Hays, both of the city of Newark, in the county of Essex and State of New Jersey, are held and firmly bound unto Robert F. Stockton, receiver of the New Jersey Mutual Life Insurance Company, in the sum of five hundred dollars, to be paid to the said Robert F. Stockton, receiver, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

116 Sealed with our seals and dated the twenty-sixth day of September, one thousand eight hundred and eighty-seven.

Whereas the above-named Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Margaret T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver have prosecuted a writ of error in the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the court of chancery of New Jersey and affirmed in the court of errors and appeals, in the last resort in all causes, by remittitur therefrom to the said court of chancery:

Now, therefore, the condition of this obligation is such that if the above-named Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Margaret T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CHARLES L. BORGMEYER. [L. S.]
JAMES L. HAYS. [L. S.]

Signed, sealed, and delivered, in the presence of—
WM. LINN ALLEN.

117 UNITED STATES OF AMERICA, *District of New Jersey,* } *ss:*

Charles L. Borgmeyer and James L. Hays, being duly sworn each for himself, deposes and says that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

CHARLES L. BORGMEYER.
JAMES L. HAYS.

Sworn to before me this 26th day of September, 1887.

WM. LINN ALLEN,
M. C. C. of N. J.

The above bond approved this 27th day of September, 1887.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

118 [Endorsed:] Supreme Court of the United States. Henry E. Reynolds and others, plaintiffs in error, *vs.* Robert F. Stockton, receiver of the N. J. Mutual Life Ins. Co., defendants in error. Bond. On writ of error to the court of chancery of New Jersey.

119 In Chancery of New Jersey.

Between—

HENRY E. REYNOLDS and Others, Petitioners,
and
ROBERT F. STOCKTON, Receiver of the New Jersey Mutual Life Insurance Company, Defendant.

A final decree dismissing the petition in the above-stated cause having been made on the twenty-fifth day of October, 1887, as of the sixteenth day of September, 1887, in pursuance of the remittitur of the court of errors and appeals—

It is ordered that the said decree be entered and filed *nunc pro tunc* as of the said sixteenth day of September, 1887.

ALEX. T. McGILL, JR., *C.*

Respectfully advised.

A. V. VAN FLEET, *V. C.*

120 [Endorsed:] In chancery of New Jersey. Between Henry E. Reynolds and others, petitioners, and Robert F. Stockton, receiver of the New Jersey Mutual Life Insurance Company. Order to enter and file decree *nunc pro tunc.* A. Q. Keasbey & Sons, sol'rs for petitioners. Filed Oct. 25, 1887.

121 In Chancery of New Jersey.

Between—

HENRY E. REYNOLDS and Others, Petitioner
and
ROBERT F. STOCKTON, Receiver of the New Jersey Mutual Life Insurance Company.

The decree in this cause made on the seventeenth day of June, eighteen hundred and eighty-seven, dismissing the appeal of the petitioners, with costs, having been appealed from, and the remittitur from the court of errors and appeals made on the twenty-second

day of July, eighteen hundred and eighty-seven, having been filed in this court, whereby it was ordered, adjudged, and decreed that the said decree of this court be in all things affirmed, with costs, in the court of errors and appeals, and this court to be paid by the appellant, and that the petition of appeal be dismissed—

It is on this sixteenth day of September, eighteen hundred and eighty-seven, in pursuance of the said remittitur, and in order to carry into effect the said order and decree of the court of errors and appeals, ordered, adjudged, and decreed that the said decree of that court, made on the seventeenth day of June, eighteen hundred and eighty-seven, be, and the same is hereby, reaffirmed, and that the said petition of the complainants be dismissed, and that said Robert F. Stockton, receiver of the New Jersey Mutual Life Insurance
122 Company, do recover his costs in the court of errors and appeals, and in this court to be taxed, and have execution therefor.

ALEX. T. McGILL, JR., *C.*

Respectfully advised.

A. V. VAN FLEET, *V. C.*

123 [Endorsed :] In chancery of New Jersey. Between Henry E. Reynolds and others, petitioners, and Robert F. Stockton, receiver of the New Jersey Mutual Life Insurance Company. A. Q. Keasbey & Sons, sol'rs. Filed Oct. 25, 1887, as of Sept. 16, 1887.

124 I, Allan McDermott, clerk of the court of chancery of the State of New Jersey, the same being a court of record, do hereby certify that the foregoing are true copies of the order to enter and file decree *nunc pro tunc*, filed Oct. 25, 1887, and order filed Oct. 25, 1887, as of Sept. 16, 1887, reaffirming decree in a cause wherein Henry E. Reynolds and others are petitioners and Robert F. Stockton, receiver of the New Jersey Mutual Life Insurance Company, now on the files of my office.

Seal of the Court of Chancery, State of New Jersey.

In testimony whereof I have hereto set my hand and affixed the seal of said court, at Trenton, this twenty-sixth day of October, A. D. eighteen hundred and eighty-seven.

ALLAN McDERMOTT, *Clerk.*

I, Alexander T. McGill, Jr., chancellor of the State of New Jersey, do hereby certify that Allan McDermott, whose name is subscribed to the above certificate, was at the date thereof and now is the clerk of the court of chancery of the State of New Jersey ; that said attestation is in due form ; that the seal thereto annexed is the seal of said court, and that the signature of the said Allan McDermott is in his own proper handwriting.

Witness my hand, at the city of Trenton, this twenty-sixth day of October, A. D. eighteen hundred and eighty-seven.

ALEX. T. McGILL, JR., *C.*

125 [Endorsed:] In chancery of New Jersey. Between Henry E. Reynolds, compl't, and Robert F. Stockton, receiver of N. J. M. L. I. Co., def't. —— ——, solicitor. Filed —— —, 188–.

Endorsed on cover: New Jersey court of chancery. No. 289. Henry E. Reynolds, Georgianna L. Reynolds, Henry B. Wilbur, Harry A. Wilbur, Margaret T. O'Reilly, Elizabeth M. O'Reilly, Margaret B. Detmar, Elizabeth S. Sprague, and John R. Traver, plaintiffs in error, *vs.* Robert F. Stockton, receiver of The New Jersey Mutual Life Insurance Company. Filed October 28, 1887.

Office Supreme Court U. S.
FILED,
MAR 28 1891
JAMES H. McKENNEY,
CLERK

EVENING POST JOB PRINTING OFFICE, N. Y.

Supreme Court of the United States.

HENRY E. REYNOLDS and others,
Plaintiffs in Error,

VERSUS

ROBERT F. STOCKTON, Receiver of the New Jersey Mutual Life,
Defendant in Error.

Statement.

The writ of error in this case (p. 62) brings up for review a decree of the Court of Chancery of New Jersey, entered on the 17th day of June, 1887, and afterwards affirmed by the Court of Errors and Appeals of New Jersey, wherein was drawn in question the construction of the first section of the fourth article of the Constitution of the United States, requiring full faith and credit to be given to judgments of other States, and the decision was against the right, title and privilege specially set up and claimed under such clause of the Constitution by Henry E. Reynolds and his associates, plaintiffs in error herein.

On the eleventh day of October, 1886, at a Special Term of the Supreme Court in Kings County, in the State of New York (p. 41), judgment was rendered in favor of the plaintiffs in error herein against Joel

Parker, as Receiver of the New Jersey Mutual Life Insurance Company, *and* against the New Jersey Mutual Life Insurance Company, for the sum of one million and ten thousand four hundred and ninety-six dollars and twenty-nine cents.

The judgment was rendered in an action, the pleadings of which are contained on pages 13 to 28, in which an order of reference was entered January 15, 1880 (p. 28).

Referring to James W. Husted, Esq., to inquire into and report his findings upon all the issues of fact, and report his opinion upon all the questions of law raised by the pleadings, and which shall be raised by or upon any claim which shall be made before him in pursuance of the other provisions of this order (p. 29, top).

Page 36. An interlocutory judgment was entered herein in 1884, and by its terms embraces the previous findings and directions (pp. 31 to 36).

The fifth finding (p. 31) shows that on the 31st of December, 1872, the New Jersey Mutual Life Insurance Company illegally obtained possession of $530,075.94 assets of the Hope Mutual Life Insurance Company, and afterwards (finding, p. 32) received an additional $300,000.

The third direction to the Referee (p. 34) is to state an account between the Hope and New Jersey Mutual, charging them with this $530,075.94, together with the additional premiums received from policyholders retaining their Hope policies, and crediting the New Jersey Company with the amount of claim paid on such policies.

Upon the coming in of the Referee's report (Mr. Prentice, page 37) a decree was entered on the 7th day of March, 1875, distributing the funds *then* in the hands of the Superintendent of Insurance, and the 8th clause (page 40), reserving liberty to apply for further directions on the foot of this decree, and "the question of the indebtedness of Joel Parker, as

Receiver of the New Jersey Mutual Life Insurance Company, and the former superintendent, * * * reported by Referee Samuel Prentice be reserved."

Under this provision in the decree of March, 1885, application for judgment against Joel Parker, as Receiver, and the New Jersey Mutual Life Insurance Company, was made in October, 1886 (page 41), and the judgment rendered as first set out herein. Application was made in Chancery, New Jersey (page 1), for leave to prove this claim against the Receiver of the New Jersey, so as to affect, first, the funds in his hands, proceeds of New Jersey assets; secondly, the sum of seventy-nine hundred dollars turned over from New York by him without notice as ancillary Receiver; and thirdly, a specific sum of fifteen hundred and forty dollars interest money in the hands of the Receiver on the Trenor mortgage, one of the securities deposited with the Superintendent of the Insurance in New York, the distribution of which was the primary object of the suit in New York, and for which sum the Court in New specifically rendered judgment. As the time to present claims in New Jersey had expired the Chancellor first made an order requiring the Receiver to show cause why the time to present this claim should not be extended for ten days, and upon the return of this order (page 3) did extend the period for ten days from November 1, 1886, and the claim was duly presented within the time, and on December 8, 1885, the claim was rejected (page 4). Upon this an appeal was taken to the Chancellor as to all three funds hereinbefore specified. The matter then came on before Advisory Master W. B. Williams February 26, 1887.

The answer of the Receiver (paragraph 2, page 5) admits the receipt of both the seventy-nine hundred dollars from New York assets and $1,540 interest on the "Trust" fund, but claims the same to have been made under an order of the New York Supreme

Court, but does not deny the allegations of the petition (page 1) that the order of the Supreme Court of New York transferring this fund, $7,900, was made without notice to the petitioners or knowledge on their part of such proceedings.

The denial in the answer (paragraph 4, page 6) that the judgment of October, 1886, was obtained without notice to Mr. Parker, as Receiver, refers only to personal notice to Mr. Parker, as the Court will see top page 45, that Mr. John E. Parsons admits service of the motion for judgment on September 29, 1886, and on his motion the hearing was adjourned to October 11th from October 7th (page 45), and in the interlocutory judgment on the 15th of January, 1880, we find the recital, "Joel Parker as Receiver of the New Jersey Mutual Life Insurance Co., appearing by John E. Parsons, Esq."

Mr. Parker as Receiver of the New Jersey Mutual was the party to the decree entered on March 7, 1885 (page 37). He took an appeal therefrom (page 43), and this appeal was dismissed September 21, 1885, and notice of entry served on the defendant September 24th. By the decree so appealed from (page 40), the question of the indebtedness of Joel Parker as Receiver of the New Jersey Mutual Life Insurance Company was specially reserved.

No appeal was taken by Mr. Parker as Receiver from the order requiring the Referee to state an account (page 34) between the New Jersey Company and the Hope Company. The Hope Company absolutely retired from business April 9, 1873 (page 12), under the provisions Chap. 463, Laws of 1853, State of New York, and the amendment thereto by Section 10, Chap. 263, Laws of 1859, being Section 19, page 1502, of the Revised Statutes of New York. All of the assets of the Hope Company were transferred to the New Jersey Mutual under the agreements set out in pages 45 and 47, except the deposit in Albany with Superintendent Smyth; and as the suit in New York is

brought by both policy *and stockholders of the Hope,* in behalf of themselves and all others similarly situated, against the New Jersey Mutual Life and its Receiver, and against John F. Smyth, Superintendent Insurance Department, the Court had before it every person on either side that had or could have had any interest in the assets turned over to the New Jersey Mutual Life in 1872, or in the deposits made with the Superintendent of the Insurance Department.

The error claimed to exist in the decision of the Court below is in holding that the New York Court, under the pleadings and proceedings in this action, after taking an account between the Hope and New Jersey Mutual Life, was limited in the use to be made of that account to the determination of the rights of the New Jersey Mutual Life in the hundred thousand dollars deposited at Albany, and could not render an affirmative judgment thereon against the defendant, the New Jersey Mutual.

The contention of the plaintiff in error is that while the complaint is inartistically drawn, it distinctly alleges matters against the New Jersey Mutual Life which, if judicially found to be be true, would establish a legal liability on the part of that company to account for the assets; and issue having been joined on these allegations and trial had, the Court could mould its judgment to conform to the facts established on the trial, and was not limited to the specific relief prayed for in the complaint.

POINTS.

Point I.

The allegations in the complaint tendered the issue of the new Jersey Mutual liability for the assets received by it in 1872.

(*A.*) The first and second paragraphs in the complaint (page 14), distinguish between the two classes of plaintiffs joined therein, in paragraph I., "all who are interested in the 'Trust Fund' hereinafter mentioned." In paragraph II., "all who are interested in the *assets* of the said company *or* the 'Trust Fund' hereinafter mentioned."

(*B.*) Paragraphs 13 and 14, 15 and 16 describe two sets of assets, paragraphs 13 and 14 referring to the "Trust Fund," and paragraphs 15 and 16 to the fund transferred to the New Jersey Mutual; there is a distinct allegation in paragraph 15 of the making of the contract of December 31, 1872 (see page 47), and this is made a part of the complaint; that contract "sells, transfers, assigns and makes over to the New Jersey Mutual all the assets, claims, contracts, reinsurances of risks, and entire business of every name and nature, now possessed, owned and held by Hope Company" (see bottom of page 48), the sixteenth paragraph alleges (page 18): "That the said contract is and at the date thereof was wholly null and void, but that if valid it conveyed and transferred to the defendant the New Jersey Mutual Life Insurance Company no interest whatever in the funds and securities upon the deposits as aforesaid, *nor in any of the assets or property of the said company*, except such as may remain after all the claims of policyholders in the said The Hope Mutual Life Insurance Company of New York are satisfied and discharged."

(*C.*) Paragraphs 17 and 18 of the complaint contain allegations of the non-user of its franchise by the "Hope" since 1872, and that such non-user was pursuant to the contract made with the New Jersey Company.

(*D.*) Paragraph 20 alleges that the Receiver and the New Jersey Company both claim an interest in the "Trust Fund," and pray, "That the claims and interest of each of the said defendants whatever they are may be settled and adjudicated in this action." I call particular attention to this twentieth paragraph as being the usual and common allegation in all cases where no personal claim is made, foreclosures of mortgages, &c. The courts in New Jersey have treated the pleadings as though it contained only this paragraph against the New Jersey Mutual and its Receiver, utterly ignoring paragraphs 15 and 16, 17 and 18 and the contract made part of paragraph 15.

(*E.*) Paragraph 21 alleges the deficit in the "Trust Fund" and the personal liability of the Superintendent of Insurance therefor, and this in paragraph 28 is alleged to amount to fifty-three thousand dollars, and paragraphs 25, 26 and 27 allegations against the Superintendent, that he was trying to shield himself from this liability through *ex parte* proceedings unauthorized by law.

(*F.*) The prayer of the complaint is for (1) a personal judgment against John F. Smyth, Superintendent; (2) the sale of the securities on hand and their distribution among the policyholders; (3) decreeing the dissolution of the Hope Company, and the distribution among its policy and stock holders of any surplus of the "Trust Fund;" (4) for such other, further or different order or relief in the premises as may be just and equitable.

Point II.

The answer of the defendant meets the allegations of the complaint (paragraphs 15 and 16) by way of confession and avoidance.

In paragraph 5 of the answer, page 24, it admits the making of the contract, and in paragraphs 9 and 10 the receipt of the assets of the company thereunder, but seeks to avoid the effect by an allegation in paragraph 6, that the New Jersey Company had, in pursuance of the provisions of that contract, made payments in all to the amount of *over two hundred and fifty thousand dollars.*

The fifth and sixth findings by Judge Pratt, pages 21 and 22, are that the New Jersey Company on December 1, 1872, received under this contract $530,075.94, and afterwards an additional sum of $300,000, making in all $850,075.94 received, and only $250,000 paid out.

Judge Pratt finds (bottom of page 31) this contract "was effected without the knowledge or consent of all the stockholders or policy or other creditors of said company and never has been ratified by all those stockholders, policyholders or other creditors; that said agreement was effected by means of the purchase by parties interested in said New Jersey Company and those acting for them, of the majority of the capital stock of said Hope Company, and in the personal interests of its officers and a majority of its directors who executed said contract, and was in fact seriously injurious to the stockholders, policyholders and other creditors of the said Hope Company.

In the third paragraph, page 34 of directions for the future account, he "ordered an account to be stated between the Hope Company and the New Jersey Company."

Point III.

This action, Cerberus like, presented three distinct heads: 1. The claim against the fund on hand; 2. The claim against John F. Smyth for deficiencies in that fund; 3. The claim against the New Jersey Life for conversion of assets under a void contract. The decree of March, 1885, disposed only of the first matter distributing the fund on hand, but *expressly reserved the questions of indebtedness of both the Superintendent of Insurance and Mr. Parker as Receiver of the New Jersey Mutual.*

Point IV.

The Court had power, on issues contested before it as to which all parties in interest had been fully heard, to allow any judgment consistent with the case made by the complaint and embraced within the issue (Section 1207, Code of Civil Procedure of New York, set out at page 13 of the Record).

On authority the judgment in this case was a conclusive adjudication of the liability of the New Jersey Mutual to the stockholders of the Hope.

I.—The adverse case relied upon by Master Williams, Munday *vs.* Vail, 5 Vroom, 418, and the only one quoted by the Court of Errors, page 57, in support of its decision, is not applicable. The facts in that case were : Asa Munday had made a deed of trust to one Conger in favor of the plaintiff Hetty Munday, in a suit brought by Ephraim Munday, a creditor, to have the deed declared fraudulent and void as against Ephraim Munday's debt, the Court not only declared it void as against Ephraim Mun-

day, but also as against Hetty Munday, and ordered the deed canceled. No proceedings were taken under this decree, the debt having been paid, but on another execution issued subsequently against Asa Munday, the premises were sold at Sheriff's sale, and the defendant Vail put in possession. The action tried was one of ejectment between Hetty Munday as plaintiff, claiming under the deed of trust, and Vail the purchaser at Sheriff's sale, relying on the language in the decree of Ephraim Munday *vs.* Asa Monday and Hetty Munday (she being at the time of the rendering of such decree an infant, appearing by guardian *ad litem*). It is perfectly clear that there never was a suggestion in Ephraim Munday's pleadings, either : I. That Ephraim Munday was the owner of the fee of the property, as in this case plaintiff John R. Traver alleges himself and his co-stockholders to be. 2. That there was *no allegation* that the deed as between Asa Munday and Hetty was void, obtained by fraud, and in violation of the rights of Ephraim Munday, irrespective of his claim as a judgment creditor. 3. There was no answer of Hetty Munday submitting to the Court the validity of the deed of trust between her and Asa Munday, and alleging that even if the Court should hold the deed valid she had in reliance thereon expended $250,000 and over in improvements upon the property, and asking to be allowed therefor if said deed should be held invalid. 4. There was no finding of the Court that the deed made by Asa Munday to Conger as trustee, was void as against the title in fee, in addition to the creditor's claim, of Ephraim Munday. 5. There was no finding of the Court that the value of the fee of the property turned over was $530,064.94, and of the rents received therefrom $300,000, and ordering an account to be stated as to the sums expended for improvements. 6. The decree did not proceed to order a sale of the land or so much thereof as might be necessary to satisfy

Ephraim Munday's claim as creditor, and expressly reserve for future consideration the questions arising out of the claim of his title of owner in the fee. 7. Neither did Conger or Hetty Munday appeal, as did Joel Parker in this case, from the decree reserving this question of Ephraim Munday's claim as owner in the fee. 8. Nor was the appeal to General Term dismissed and the one year given to appeal to the Court of Appeals allowed to pass without taking such an appeal. 9. There was no *specific motion thereafter made by Ephraim Munday for judgment between him and Conger and Hetty Munday as to the validity of the title between her and Asa Munday*, and her obligations for mesne rents and profits upon the state of the accounts taken under order of the Court at her request and allowing her all the sums she claimed to have paid out for improvements.

These, I submit, are manifest and radical distinctions between the case of Munday *v.* Vail and the case at bar.

The decree in Munday *v.* Vail was clearly an inadvertence, a lack of precision in the draughtsman. Chief Justice Beasley says (page 421): "My respect for the Court and for counsel engaged in those proceedings lead me to the conviction that it was the result of inadvertence and the ground of this conviction is it deprived an infant defendant of an estate vested in her without an issue or a hearing with respects to her rights." In the case at bar we have not an infant defendant, but an insurance company with a Receiver, one of the Judges of the Court of Error of the State of New Jersey, and with such able counsel representing him in the State of New York as Mr. John E. Parsons. Again, there is a distinct issue here presented by the allegations of Mr. Traver, 2d, 15th and 16th paragraphs of complaint, and the 5th to the 10th paragraphs of the answer. There was a hearing actual through all the references and the proceedings up to September, 1885, there was notice

and full opportunity given to be heard in October, 1886, but the defendant elected not to be heard and preferred to stand upon the position that *after a verdict was rendered against him as Receiver, he could resign without notice to any party in that action, and thereby deprive the plaintiffs of any right to enter judgment against him.*

There is this further manifest distinction between the case of Munday *v.* Vail and the case at bar pointed out by Chief Justice Beasley (page 421). In that case the creditor had *no standing* to ask that the deed of trust should be annulled as between the trustee and *cestuis que trust.* In this case John Traver the plaintiff stockholder, sues in that capacity, and makes allegations not only of the invalidity of the deed and his rights resulting therefrom, paragraphs 15 and 16, but also in paragraphs 17 and 18 of the complaint alleges matters which entitle him and other stockholders to be subrogated to all the rights of the Hope Life, there is sufficient allegations for the purposes of sustaining this judgment of the refusal of the corporation to bring the suit in the allegation, paragraph 18, that the said insurance company "Ever since, has and now does refuse and neglects to exercise its rights and franchises."

II.—The authorities cited in Munday *v.* Vail do not controvert this position. They are Coke upon Littleton, 352B, where, in explaining the rules of estoppel, he gives as the fourth limitation "a matter alleged that is neither traversable nor material shall not estop." This has no application here, as the invalidity of the contract between the Hope and New Jersey is distinctly alleged; the same remark applies to the next citation, Baron Comyn in note in the Duchess of Kingston's case, 2 Smith's Lead. Cases, 535. Judgments "are conclusive" as to nothing which might not have been in question or was not material. "The instances given on such matters are

Attorney-General *v.* King, 5 Price, 195, as to the particular day in an indictment, and Skipworth *v.* Greene, 1 Strange, 610, where the tenant was held not to be estopped by the description of the nature of the land in the least. The case of Outram *v.* Morewood, 3 East, 346, contains an elaborate discussion of the extent of the doctrine of estoppel by record (pages 356-358), the question decided is whether an allegation on record upon which issue has been once taken and found is between the parties taking it and their privies conclusive according to the finding thereof," and so holds after a full examination of the authorities. The question tried in the New York Court was the state of the accounts between the New Jersey and Hope Life, and the answer of the Receiver to the petition, pages, 8, 9 and 10, seeks to reopen this accounting and to bring into it certain claims which he alleges the New Jersey Mutual Life has against private individuals not parties to either litigation, for violation of their duty as directors of the New Jersey Mutual. In the case of Gifford *v.* Hoit, 3 Schoales and Lefroy's Reports, page 386, Lord Chancellor Redesdale lays down the rule which we invoke in this case: "Where all the parties are brought before the Court that can be brought before it, and the Court acts on the property according to the rights that appear, without fraud, its decision must, of necessity, be final and conclusive." In Gore *v.* Sacpole, 1 Dow., 30, merely decides that a judgment obtained by fraud was not a protection to the person holding under it, who was cognizant of the fraud when he took under the judgment. Lord Eldon in his opinion (page 31) draws the distinction that I have already pointed out between this case and Munday *v.* Vail, that here we have not only the creditor but owner of the fee, parties plaintiff. Colclough *v.* Sterum, 3 Bligh. R., 186, merely decides that a purchaser under a decree directing lands

to be sold subject to encumbrances prior but *not* subsequent to the date of its settlement, 1767, where the sale is made subject to both, such encumbrances cannot be protected, the decree affording protection to such acts only as are done in *pursuance of it*, and *not those in violation*. Curtis *v.* Price, 12 Vesey, 102, merely declares that a conveyance made to defraud creditors, though voidable by them is valid against the vendor and his heirs, the last case cited, Corwithe *v.* Griffin, 21 Barber, 9, a judgment in partition was entered on a *cognovit* of the defendant's acknowledging the correctness of the allegations contained in the petition, and consenting that partition should be made of the land *therein described*, the Court held that such a consent would not support a judgment for the partition of land *not therein described*. This case, certainly, has no bearing as to what judgment may be taken after issue joined and trial had.

III.—The following authorities are relied on as sustaining the New York judgment:

UNITED STATES CASES.

Six Nations *et al. v.* Johnson *et al.*, 24 Howard's Rep., U. S., page 202.

Mr. Justice CLIFFORD:

Opinion of the Court.—Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court. Whenever the parties to a suit, and the subject-matter in controversy between them, are within the regular jurisdiction of a court of equity, the decree of that court is to every intent as binding as would be the judgment of a court of law.

Had the decree, therefore, been rendered in the subordinate court before the appeal, the right of the plaintiffs below to recover in this suit would have been beyond question, unless there is some other error in the record. Courts of general jurisdiction are presumed to act by right, and not by wrong, unless it clearly appears that they have transcended their powers.

Gregnon's Lessee *v.* Astor, 2 Howard, 319. Voorhees *v.* The Bank of U. S., 10 Pet., 440.

(Page 203.) Personal service was made upon the defendant in this case by due process of law in the court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered to the suit, and secured an erroneous judgment in his favor, may voluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not.

Eldred *v.* Bank, 17 Wallace's Rep. U. S., page 551.

Mr. Justice MILLER:

Opinion of the Court.—It is argued by the counsel of the defendant in error that the withdrawal of the plea of Anson Eldred left the case as to him as though he had never filed the plea, and that never having been served with process he was not liable to the personal judgment of the Court.

We do not agree to this proposition. The filing of the plea was both an appearance and a defense. The case stood for the time between one term and another with an appearance and a plea. The with-

drawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring that defendant again within the jurisdiction of the Court.

Habich *v.* Folger, 20 Wallace, 6.

Mr. Justice HUNT:

Opinion of the Court.—The copy of the record referred to shows that the trustees (the present plaintiffs in error), the Columbian Insurance Company, by its attorney, and the receivers, by their attorney, composing all who in any manner were interested in the transaction or entitled to appear in the action, were before the Court; and that on the 14th of June a formal judgment for the amount was rendered for the plaintiff, reciting that the trustees are charged upon their answer, and the claimants withdrew.

It is impossible to present the case of a judgment which would be more conclusive upon the corporation, and upon the receivers, than the case presented. They were parties in form and in fact.

NEW YORK CASES.

Dusenbury *v.* Dusenbury, 4 Civil Procedure Reports, page 128.

Neither is the Court limited in awarding judgment; that is given in accord with the facts, and not the requests of the suitor. A different rule would make the actions of the Court subordinate to the wish of parties instead of the rules of law or practice. This portion of a pleading is given controlling effect *but in one instance*. It is where there is no answer the judgment must be restricted to what is asked for in the complaint. If an answer is interposed, the Court grants any relief within the case shown by the complaint and embraced in the issue. If the defendant answers, the demand for relief becomes immaterial. Marquart *v.* Marquart, 12 N. Y.,

336; Emery *v.* Pease, 20 *Id.*, 62; Redfield *v.* Frear, 9 Abb. N. S., 449; Hopkins *v.* Lane, 2 Hun, 38; Caswell *v.* West, 3 T. & C. (N. Y. Sup.), 383.

Chester *v.* Jumel, 24 N. Y. State Rep., Sup. Ct., 230.

Justice DANIELS:

Opinion of the Court.—It was not important that the demand for judgment contained in the complaint did not specifically require all the relief provided for by the Referee and the judgment following his report. For where an issue of fact may be taken in an action, as was the case here, the judgment is required to dispose of the action and to award any suitable relief adapted to the case and within the issue. The relief which was provided for was within the application of this provision of the Code, as it is contained in Section 1207.

Boardman *v.* Davidson, 7 Abbott's Rep., 448.

Justice JONES:

Opinion of the Court.—Another of the cases is Baily *v.* Baily (8 Humph., 334), in which case the Court did certainly grant to the plaintiff, upon the defendant's answer, relief clearly not within the case made by the bill. This, as appears by the opinion of the Court, was based on an admission in the answer that the defendant was willing to perform the contract alleged by him, as the Court might direct; for the language of the Court is: "Inasmuch as the defendant William Baily admitted in his answer that he had agreed to convey, in consideration of the deed made to him a certain tract of land, and that he was willing to convey the same as the Court might direct, the complainant may have a decree vesting him with a title to the same." In the case at bar a similar admission is made.

Muldowney *v.* Morris & Essex R. R. Co., 42 Hun, 447.

Defendant's Answer, page 24.

Justice PRATT :

Opinion of the Court.—It is plain that if the plaintiff can have no relief in this action, he is without remedy, for he has stated all the facts constituting his cause of action, and answer has been interposed and the issues tried. To so state his facts was all the law required of him, and an answer having been filed and case tried, it was competent for the Court to permit the plaintiff to take *any judgment consistent with the case* made by the complaint and embraced within the issue. The object is to do *complete justice between the parties when they both have an opportunity to be heard, irrespective of any theories the parties may entertain when they file their pleadings.*

Under the present system of Code pleading the plaintiff must state the facts and pray for such relief as he supposes himself entitled, but he is not to be turned out of Court because he prays for too much or too little, or wrong relief. In this case the plaintiff prayed for enough, but if he prayed for too much it is of no consequence.

Banich *v.* Schifferdecker, 48 Hun, 357.

Justice LANDON :

Opinion of the Court.—The plaintiff was allowed to recover damages down to the time of the trial. If the action had been simply an action at law for damages, this would have been error (Uline *vs.* N. Y. C. R. R. Co., 101 N. Y., 109, 116). But as the action was for relief, both in law and equity, it was proper for the Court to allow a recovery for damages down to the day of the trial,

because *when a court of equity once has jurisdiction of a case, it awards all the relief the nature of the case demands* (*Madison Ave. Bap. Ch.* vs. *Bap. Ch. in Oliver St.*, 73 *N. Y.*, 95).

Armitage *vs.* Pulver, 37 N. Y., 496.

Justice WOODRUFF:

Opinion of the Court.—In the face of an express statute providing that where the defendants appear and answer, the Court may grant the plaintiff *any relief consistent with the case* made by the complaint, and embraced within the issue (Code, § 275), it is not error, to allow the plaintiff any judgment to which, upon the allegations and proof, he is entitled, either at law or equity.

Graham *et al. vs.* Read *et al.*, 57 New York, 683.

Held, that inasmuch as the complaint is based upon the assumption of the validity of the transaction, and it was asked that the trust be established and enforced, plaintiffs would not claim it to be illegal; that, while the prayer for relief in a complaint did not control, and the Court could give any other relief consistent with the case made in the complaint, the judgment must be still *secundum allegata et probata;* that judgment could not be given in direct hostility to the theory of the action and the substantial allegations of the complaint.

Madison Ave. Bap. Ch. *vs.* Oliver St. Bap. Ch., 73 N. Y., 95.

Justice EARL:

Opinion of the Court.—It matters not that the defendant obtained the other mortgages after the commencement of the action. They were due before the action was finally at issue, and in adjust-

ing the equitable rights of the parties, the Court could properly require payment of them also. It is the practice of courts of equity, when they have once obtained jurisdiction of a case, to administer *all the relief which the nature of the case and the facts demand*, and to bring such relief down to the close of the litigation between the parties.

Murtha *v.* Curley, 90 N. Y., 377.

Justice EARLE:

Opinion of the Court.—Even if the prayer for judgment was defective for equitable relief, an answer having been interposed, the plaintiff could have any relief "consistent with the case made by the complaint, and embraced within the issue" (Code, § 1207).

Under our present system of practice a plaintiff is not to be turned out of Court when an answer has been interposed, because he has prayed for too much or too little relief, or for wrong relief.

Chatfield *v.* Simonson *et al.*, 92 N. Y., 216.

Chief Justice RUGER:

Opinion of the Court.—The rule has been so frequently stated in this Court that the relief demanded in a pleading is unimportant so long as the facts stoted entitle the party pleading them to some form of relief, that no one ought now to be considered ignorant of it. The courts now uniformly administer the relief to which the facts set forth in a pleading seem to entitle the party, without regard to the particular form of relief demanded.

Peck *v.* Goodbulett, 109 N. Y., 189.

Justice DANFORTH:

Opinion of the Court.—The appellant objects to a discussion which goes beyond the cause of action

stated in the complaint, but his counsel did not except to the refusal of the Referee to dismiss the complaint upon that ground, nor was the evidence offered by the plaintiff objected to, for the reason that it was not within the proceedings. In the absence of such objections, it was the duty of the Court below to give the plaintiff the benefit of any cause of action established by the evidence.

IV.—Prayer for general relief in the bill was sufficient, coupled with the *prayer for special relief, given at the hearing* by the notice of motion (Story's Equity Pleadings, Section 40), in support of which he cites Note 2, Metf. Eq. Pl. by Jeremy, 38, 39; Cooper Eq. Pl., 14; Barton's Suit in Eq., 40, Note (1); Wilkinson *v.* Beal, 4 Mad.

(*a.*) It was so held in two recent cases in America (Lewiston Falls Manuf. Co., 408; Cook *v.* Martyn, 2 Atk. 2; Grimes *v.* French, 2 Atk., 141; Topham *v.* Constantine, Tamlyn, 135; Manaton *v.* Molesworth, 1 Eden, 26, and note.

(*b.*) Metf. Eq. Pl., by Jeremy, 46, note (*x*); 3 Woodes, Sec. 35, pages 372, 373. In Cook *v.* Martyn, 2. Atk., 3, Lord Hardwicke is reported to have said: "Praying general relief is sufficient, though the "plaintiff should not be more explicit in the prayer "of the bill; and Mr. Robins, a very eminent counsel, "used to say, general relief was the best prayer next "to the Lord's Prayer."

Point V.

The judgment being valid in New York, conclusively established the debt in New Jersey, and the rejection of the claim violated the Constitution.

Bank of the United States *vs.* Merchants' Bank of Baltimore, 7 Gill, 431.

Justice MARTIN:

Opinion of the Court.—And although there certainly has existed some diversity and fluctuation of judicial opinion with respect to the true import of the clause in the Constitution and the Act of Congress to which we have referred, yet, we think, that according to the interpretation which has been authoritatively placed upon them by the Supreme Court, the judgment set forth in the plea must be regarded as possessing the same operation and effect to which it would be entitled in the State of Pennsylvania. That is, that the judgment is to be here estimated in the scale of evidence as creating a debt of record, conclusive with reference to the subject matter involved in the controversy in which it was rendered; not liable to be controverted or impeached, unless upon the grounds that it was procured through the instrumentality of fraud, or that the Court pronouncing it, was not clothed with competent jurisdiction.

Mills *vs.* Duryee, 7 Cranch, 481.

Error to the Circuit Court for the District of Columbia in an action of debt upon a judgment of the Supreme Court of the State of New York, to which the defendant below pleaded *nil debit*, which plea, upon general demurrer, was adjudged bad.

Page 483. March 11th, Story, *J.*, delivered the opinion of the Court as follows:

The question in this case is, whether *nil debit* is a good plea to an action of debt brought in the courts of this district on a judgment rendered in a court of record of the State of New York, one of the United States.

Page 485. Were the construction contended for by the plaintiff in error to prevail, that judgments of the State courts ought to be considered *prima facie* evidence only, this clause in the Constitution

would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the Act of Congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision.

Harris *v.* Hardeman *et al.*, 14 Howard's Rep. U. S.

Mr. Justice DANIEL:

Page 343. The principle is too well settled, and too plain to be controverted, that a judgment or decree, pronounced by a competent tribunal, against a party having actual, or constructive notice, of the pending of the suit, is to be regarded by every other co-ordinate tribunal, and that, if the judgment or decree be erroneous, the error corrected only by a supreme appellate tribunal. The leading distinction is between judgments and decrees merely void, and such as are voidable only. The former are binding nowhere, the latter everywhere, until reversed by a superior authority.

D'Arcy *v.* Ketchum *et al.*, 11 Howard's Rep., U. S., page 175.

Justice CARTON:

Opinion of the Court.—These provisions were considered by this Court in the case of Mills *v.* Duryee, 7 Cranch, 483, where it was held that the recited sentence of the Act 1790 did declare the effect of a State judgment, by enacting that it should have such faith and credit in every other State as it had in the courts of the State from whence it was taken; and that a judgment, where the defendant had been served with process, concluded such defendant from

pleading *nil debit* when sued in another State on the record, and consequently from going behind the judgment and re-examining the original cause of action, that he was concluded by the record in like manner as he stood concluded in the State where the judgment was rendered.

This decision was made in 1813, and has since been followed as the binding and proper construction of the Act of 1790 in cases where process has been served.

Christmas *versus* Russell, 5 Wallace, 301.

Mr. Justice CLIFFORD:

Opinion of the Court.—Article IV., Section 1 of the Constitution provides, that "full faith and credit shall be given in every State to the public acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such records shall be proved, and the effect thereof." Congress has exercised that power, and in effect provided that the judicial records in one State shall be proved in the tribunals of another, by the attestation of the Clerk, under the seal of the Court, with the certificate of the Judge that the attestation is in due form. 2. That such records so authenticated "shall have such faith and credit given to them in every other court in the United States as they have by law or usage in the courts of the State from whence the said records were or shall be taken." When the question of the construction of that Act of Congress was first presented to this Court it was argued that the act provided only for the admission of such records as evidence; that it did not declare this effect; but the Court refused to adopt the proposition, and held, as the act expressly declares, that the record, when duly authenticated, shall have in every other court in the United States the same faith and credit as

it has in the State court from whence it was taken.

Repeated decisions made since that time have affirmed the same rule, which is applicable in all similar cases where it appears that the Court had jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defense. Where the jurisdiction has attached, the judgment is conclusive for all purposes, and it is not open to any inquiry upon the merits. Speaking of the beforementioned Act of Congress, Judge Story says it has been settled, upon solemn argument, that that enactment does declare the effect of the records as evidence when duly authenticated. * * * "If a judgment is conclusive in the State where it was pronounced, it is equally conclusive everywhere," in the courts of the United States.

Point VI.

The decision of the Court of Errors that the Receiver was not bound by the judgment recovered in another State because of the fact that he was a Receiver of the Court of Chancery of New Jersey is claimed to be erroneous.

(*A.*) The record shows, page 52, that the Court of Chancery in New Jersey was fully apprized of the action of its Receiver in becoming a party to the suit in New York, and that $7,900 of the funds against which this claim is asserted was brought from the State of New York, *pendente lite*, surreptitiously, so far as the litigants in this suit were concerned.

(*B.*) There is no exemption on authority or principle permitting a person holding title by proceedings

in invitum any higher rights as to that property than the original owner or his assignee would have, and an officer of court who, by its permission, submits a matter to adjudication is legally bound.

(*C.*) This point was fully examined in People *v.* Knickerbocker, 43 Hun, 574, reversed in 106 N. Y., 619; holding that the action of the Receiver in *that* case did not amount to making himself a party, but not questioning the doctrine that had he made himself a party with the sanction of the Court appointing him, legally he would have been bound by the decision in the case.

(1.) At page 623 the Court says :

"The funds in his (Receiver's) hands should not be affected by it (judgment in another State) *unless* by interference or otherwise under the direction of the Court appointing him he has made himself responsible for the final result of the litigation between the parties (McCulloch *v.* Norwood, 58 N. Y., 563).

(2.) On page 624. The Court cite Castle *v.* Noyes, 14 N. Y., 329; Jay *v.* DeGroot, 2 Hun, 205; holding the judgment conclusive on parties actual or formal to the litigation, and say, " but it can have no application here where the question is whether the appellant was a party in fact."

(3.) At page 625. The sole object and reason of his intervention on the writ of error was to protect the property in his hands from an encumbrance "*which had no connection with the subject matter of litigation in the original suit, but which grew out of a distinct and collateral act of the company after judgment in that suit and in an endeavor to avoid it.*"

(4.) It is not material to further discuss this case, the only point of difference between the General Term and the Court of Appeals was whether the facts in *that* case did or did not show the Receiver had make himself a party to the original suit, as well to the writ of error, and that question is now pending in this Court (Case No. 582). The point urged here is that both Courts admit that if the Receiver was a party, with the permission of the Court appointing him, he would be bound.

(5.) In the brief filed by Hon. Leslie W. Russell, counsel for appellant in that case, and formerly Attorney-General of the State of New York, at page 3 we find this statement, the italics being his own:

"Subsequently (to the reversal), on January 25, 1886, the plaintiffs in that suit, without causing the Receiver to be substituted as a party to the action, and without serving him with any process whatever, took judgment *by default against the Knickerbocker Life Insurance Company* for the sum of $17,560.12."

In the case at bar the Receiver had been an active participant for seven years in the litigation, had appealed from the judgment entered as to the fund, was given formal notice of motion for the personal judgment against him and appeared and procured an adjournment of the hearing.

(6.) At page 5 we find the statement:

"That judgment was rendered in an action to which the Receiver was in nowise a party, and does not purport to be against him either personally or in his official capacity." So, lower down on the same page, referring to a judgment against a dissolved corporation, he says:

"It was held that when such judgments have been rendered without the *legal presence of the company*,

it could not be held *to be binding on the Receiver, there being no order substituting such Receiver as a party*" (McCulloch *v* Norwood, 58 N. Y., 562).

In the case at bar the Receiver *and* the company were both parties.

(7.) There is no allegation that the New Jersey Mutual was ever dissolved; on the contrary, it appears and answers in this case. The appointment of a receiver does not imply dissolution. This renders unnecessary an examination of cases like

Sturges *v.* Vanderbilt, 73 N. Y., 384.
Merrimac *v.* Potomac Co., 8 Pet., 286.
Matter of Norwood, 32 Hun, 196, 199.
Habich *v.* Folger, 20 Wall., 1.
Hibernia Bank *v.* Mechanics' Bank, 21 Hun, 166.
Kelly *v*, Crapo, 45 N. Y., 86.
O'Mahony *v.* Belmont, 62 N. Y., 133, 149.

(8.) The record showing the company and the Receive to be parties cannot be contradicted by parol.

Noyes *v.* Butler, 6 Barb., 613.

(9.) As to Receiver submitting matters to foreign courts; see

Cruger *v.* Hudson R. R. R. Co., 12 N. Y., 190.

(10.) In Jay *v.* De Groot, 2 Hun, 205; affirmed in 106 N. Y., 624, the head-note is:

Where the Court allows any person to appear and be heard upon the argument of a motion in the decision of which he is interested, such hearing is as effectual as though such person *had received notice of the motion and had been named as a formal party*

to it, and he is fully concluded by the disposition which the Court may make of such motion. Citing
Dwight *v.* St. John, 25 N. Y., 203.
Castle *v.* Noyes, 14 N. Y., 329.

(11.) I can best illustrate the difference between the view of this case, taken *before* and *after* judgment, by quoting the view of the Receiver and the Advisory Master and Court of Errors (pages 7, 52, 57) with the answer filed by the Receiver of the New Jersey Mutual Life (paragraphs 5, 6, 7, 12; pages 24 and 25) hereinbefore referred to, and the Receiver's report to the Court of Chancery, made in 1880, six years before the decree in this case (page 52), on which, referring to this Reynold's suit, he advises the Court of Chancery:

"This suit is brought to distribute the assets of the Hope Mutual Life Insurance, and to determine the rights of all the parties to the assets. The case then came on for trial and was then referred for trial to William McDermott, under an order which permits the Insurance Department to carry *along with it*, before the Referee, a proceeding for the distribution of the funds deposited by said company with it. It is similar, in some respects, to the Underhill case."

But, *after* judgment, when the Court had acted upon the question presented in paragraphs 6 and 7 of the answer, and determined that even allowing all the New Jersey Mutual Life and its Receiver claimed, still there was a balance due by the New Jersey Mutual and its Receiver of over a million dollars. Then the Receiver removes the assets held by him as ancillary Receiver out of the State *during the time the Statute gives him to appeal*, and then claims, *after* judgment (page 7): "That no issue was made by the pleading on which the true state of the

accounts between the Hope Mutual Life Insurance Company and the New Jersey Mutual Life could be tried" (page 53). The Master also finds: "The *whole scope* of that suit was to ascertain who were entitled to the fund in charge of the N. Y. Insurance Department and to distribute it," and the Court of Errors, in affirming, says (page 57): "The object of the New York suit was fully accomplished, so far as the pleadings disclosed its purpose, when the New York fund was disposed of." And the question presented for review now is *which* of the Receiver's description of the suit is right.

(12.) The allegation of the Receiver's answer (page 7) that the state of the account, in point of fact, was not tried in the New York suit, is in direct conflict with the record showing such account was actually taken and the decree made thereon.

Wherefore, it is submitted the judgment should be reversed, with directions to admit the claim based on the judgment as a claim *pro rata* on the assets in New Jersey, exclusive of the $1,540 or $7,900 and its accumulations, and as a preferred claim against said $1,540 or $7,900 and its accumulations.

Respectfully submitted,

A. Q. Keasbey & Sons,
Attorneys for Plaintiff in Error.

Raphael J. Moses, Jr.
Counsel.

December 17, 1890.

Office Supreme Court U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 289.

HENRY E. REYNOLDS AND OTHERS,

Plaintiffs in Error,

vs.

ROBERT F. STOCKTON,

RECEIVER OF THE N. J. MUTUAL LIFE INS. CO.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

The Court of Errors and Appeals of New Jersey refused to give full faith and credit to a judgment obtained in New York against the receiver of the New Jersey Company, who was also ancillary receiver in New York, in a suit to which he was a party and appeared and answered, which judgment was made in pursuance of an order from which he appealed ineffectually. The New Jersey Court by this decision refused to allow the plaintiff in this judgment to participate in the assets in the hands of the receiver in New Jersey.

The action of the Court was placed upon this ground,—that "the decree in New York having adjudicated a matter not presented by the pleadings nor within the issue, can have no higher effect than a judgment rendered in our own courts under like conditions, and under the authority of *Munday* v. *Vail*, it must be treated as a nullity." (Case, page 57.)

The matter *was* presented by the pleadings and within the issue; the judgment was final and conclusive in New York, a like judgment in New Jersey would be conclusive there; and this New York judgment, by virtue of the Constitution and Sec. 905, *Rev. Stat.*, was entitled to like faith and credit as against the receiver, in his Chancery proceedings in New Jersey.

Before examining the "matter presented by the pleadings," some familiar principles of equity procedure may be stated.

"Courts of equity may adjust their decrees so as to meet most, if not all, the exigencies arising out of the posture of cases before them; and they may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of the parties.

"So, that one of the most striking and distinctive features of courts of equity is, that they can adapt their decrees to all the varieties of circumstances which may arise and adjust them to all the peculiar rights of all the parties in interest." (1 *Story Eq. Jur.* Sec. 28.)

After citing numerous instances of this flexibility, he adds, (Sec. 437–9): "In all these, and many other cases which might be mentioned, courts of equity undo what has been done, if wrong; and do what has been left undone, if right."

And such flexibility of relief is not circumscribed by the prayer of the bill. It may be given under the prayer for general relief.

"It is in general true that a prayer for general relief, without a special prayer for the particular relief to which the plaintiff thinks himself entitled, will be sufficient, and that the particular relief which the case requires may at the hearing be prayed at the bar." (*Story Eq. Pl.*, Sec. 41.)

"But the Court will grant such relief only as the case stated will justify."

Ib. 42

Annin v. *Annin*, 9 C. E. G. 184.

"It is enough to say that if the special prayers were such that no relief could be granted under them, the Court, under the prayer for general relief, may grant any appropriate relief consistent with the case made by the bill."

Hill v. *Beach*, 1 Beas. 31.

WILLIAMSON, *C.*, said: "If the facts which the complainant states are broad enough to give him relief, it matters not how narrow his prayer may be if his bill contains a prayer for general relief. And although he may claim a relief not at all warranted by his facts, or may be entitled to a relief upon very different principles of equity from what he supposed, such a misapprehension of his case cannot defeat his right to relief."

This is of course true only when, as in this case, the party to be affected by the decree is personally before the Court.

But if he *is* before the Court, it is of no consequence that the *res*, whether real or personal, is beyond the jurisdiction of the Court.

This the Court has recently held in the case of *Cole* v. *Cunningham*, 133 U. S. 107, where the question was as to the conclusive effect of a proceeding in New York upon property and proceedings concerning it in Massachusetts.

In that case the Court, although refusing such effect in the matter before it, said that in proper cases the Constitution permits equity courts in one State to control persons within their jurisdiction from prosecuting suits in another.

The Chief Justice says the Constitution and Section 905, (*Rev. Stat.*) do not prevent inquiry into *jurisdiction*, nor into the right of the State to exercise authority over the parties or the subject matter, nor whether the judgment is impeachable for fraud.

He cites *Phelps* v. *McDonald*, 99 U. S. 298: "Where the necessary parties are before the Court of Equity, it is immaterial that the *res*, whether real or personal, is beyond the territorial jurisdiction. It has power to compel the defendant to do all things necessary according to the *lex loci rei sitae*, which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*.

Mr. Justice MILLER, in his dissenting opinion, said:

"If the citizens of Massachusetts have obtained rights in New York courts which have become a part of the records and judicial proceedings of those courts, no matter how the law under which those rights are established may be opposed to the State of Massachusetts, they are to be respected by the courts of Massachusetts, because they are effectual over the parties and subject matter in New York, and because by the court of the United States and the act of Congress of May 26, 1890, (Sec. 905) assert the principle that the courts of Massachusetts must give full credit, by which is meant the same effect to the proceedings in New York which that State gives to them."

In this case the Court in the prevailing opinion cited—

Penn. v. *Lord Baltimore*, 1 Ves. Sr. 444, where Lord Hard-

wicke recognized the principle that equity, as it acts primarily *in personam*, and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction makes a decree, upon the ground of a contract, in any equity subsisting between the parties respecting property situated out of the jurisdiction."

2 *Lead. Cas. in Eq.*, 4th Am. Ed. 1806, and cases cited.

And not only is this true on general principles of equity jurisdiction, but it is expressly provided for by the code of New York, quoted on page 13 of Case.

Sec. 1207. "Where there is an answer, the Court may permit the plaintiff to take any judgment consistent with the case and embraced within the issue." And it is fully illustrated in the citations from cases on pages 14 to 21 of the brief.

The whole question, therefore, is whether the relief granted here, in the personal judgment against the receiver, who had not only answered, but appealed ineffectually from that judgment, was consistent with the case stated in the bill of complaint.

If it was—and no narrow rule is to applied—then in the language of this Court in *Phelps* v. *McDonald*, "without regard to the situation of the subject matter, a court of equity considers the equities between the parties, and decrees *in personam* according to those equities, and enforces obedience to its decree by process *in personam*.

And it follows, that such a judgment or decree is of equally conclusive effect, in another State, under the Constitution and Section 905 of the Revised Statutes, the act of March 26, 1790.

What, then, are the facts stated in the bill? and was the judgment against the receiver in Court, after answer and appeal, for the payment of a debt of the insolvent corporation which he represented, out of its funds in his hands, whether in New York or New Jersey, consistent with those facts and the case which they laid before the Court?

These are the questions upon which this case depends.

To state the facts in the smallest compass, stripped of technical language, the plaintiffs, who lay their grievances before the Court, were of two classes—the *policy-holders* and the *stockholders* of the defunct Hope Company, complaining for themselves and all others in like situation.

They say, in substance: This company, now swallowed up

by the New Jersey Company, was bound to us on policy contracts, and for debts, which are unfulfilled and unpaid, and as stockholders, owners of its clear assets; and so bound to many others who may come in and share with us.

That company has a trust fund in the hands of the New York Superintendent of Insurance.

We, who are policy-holders, are interested in that fund, because it was deposited there, under the law, for our protection.

And we, who are *stockholders, are interested in the assets of the company*, for out of them alone can its debts be paid and its affairs wound up, so that our rights in it can be ascertained.

On December 31, 1872, the company, in whose trust fund and assets we are so interested, made a fraudulent contract for the reinsurance of all its risks with the New Jersey Company; turned over all its assets, except the trust fund, which it could not remove, to the New Jersey Company, which took all its assets, and thereupon the Hope Company, practically, became defunct, and abandoned its policy-holders and repudiated all its liabilities—vacating its functions and franchises.

That such contract was wholly null and void, and if valid conveyed no interest in the trust fund on deposit, *nor in any of the assets or property of the Hope Company, except such as may remain after all the claims of its policy-holders are satisfied and discharged.*

Therefore we, the *policy-holders*, claim the amounts due to us, out of the trust fund.

And *all*—both policy-holders and stockholders—show that the New Jersey Company is insolvent, and in the hands of Joel Parker, receiver, and that he, as such, claims some right to the trust fund, (we having already alleged that his company has taken all the other assets under a fraudulent and void contract.) And *we* pray "*that the claims and interests of each of the said defendants, whatever they are, may be settled and adjudicated on this action.*" (Record, p. 19.)

This is substantially the case made by the bill, and these the facts stated.

There are complaints made as to the Superintendent of Insurance, as to the disposition of his trust fund, and some facts as to the position of the complaining *stockholders*, but the above is the substance of the case made.

It is true that (having already prayed that the claims and interests of both companies, whatever they are, may be settled and adjudicated in the action), the formal prayer for judgment is for the distribution of the trust fund, the dissolution of the Hope Company, the payment of the *policy-holders* and *creditors*, and the distribution of any surplus of the trust fund among the creditors, and for such other relief in the premises as may be just and equitable—without formally and in terms asking that the receiver may be decreed to return the assets unlawfully taken, or pay their value, so that the complaining policy-holders and stockholders may get their own, and the creditors be paid out of the debtor's funds unlawfully abstracted.

Now, does not that case so made, present a situation where a court of equity is flexible enough, in its powers of relief, to "consider the equities between the parties, and decree *in personam* according to those equities?"

But if the case made by the bill creates any such difficulty, it is dispelled by the answer.

The receiver was served with process and appeared and filed his answer.

He said in substance that the trust fund belonged to him as receiver.

That the agreement of December 31, 1872, was made, but whether it was valid or not he asks the Court to determine, but that under it the New Jersey Company had assumed nine millions of dollars of risks, and had paid to policy-holders of the Hope Company, $250,000 and over.

That the agreement should be maintained so far as necessary to protect and indemnify the New Jersey Company and its receiver.

That the object of the agreement was that the New Jersey Company should assume all the Hope Company's risks *and take all its assets*, and that it did assume the risks, and afterwards became insolvent.

And that it did take, under the agreement, *all the property and effects of the Hope Company, including the trust fund*, and he prays that the trust fund may be paid over to him as receiver.

Certainly here arose a case for the relief actually adjudged. The receiver admitted that his company had taken all the assets in which the plaintiff claimed an interest, and submitted to the

Court the very question, whether he had lawfully received them; but claimed the trust fund, because his company had already paid $250,000 to policy-holders of the Hope Company.

Thus he distinctly submitted to the Court in his answer the question of all the mutual rights and interests of the two companies, as the plaintiff had prayed in his bill that all such claims and interests, whatever they were, might be adjudicated in the action. The Court of Errors of New Jersey was manifestly incautious in saying, (Case, p. 57): "The issue made by the answer of Receiver Parker clearly restricts the inquiry in that case to the disposition of the New York fund." He submitted the whole matter arising out of the relations of the two companies.

Thus invoked by both parties, the Court proceeded to do as both desired. Undoubtedly the prominent matter in the minds of both was the trust fund, and to this the attention of the Court was most sharply drawn. But the broader object proposed by both was not finally lost sight of.

The course of the adjudication was this:

January 15, 1880, Judge GILBERT made an order reciting that the action was reached in regular order for trial, and that the Superintendent of Insurance and the receiver of the New Jersey Company were present through their counsel, and directing a reference to James W. Husted "to inquire into and report his findings upon all the issues of fact, and to report his opinion upon all questions of law raised by the pleadings, and which shall be raised by or upon any other claims which shall be made before him in pursuance of the other provisions of the order, with certain special directions as to the situation of the trust fund and the claims upon it."

The order contained this direction: "That the report of the referee when ready shall be presented to the Court for confirmation and for determination of all questions, upon notice to the attorneys of all parties who shall appear upon the reference, with liberty to any party to file exceptions thereto, according to the rules and practice of the Court."

This order is on page 28 of the Case.

After the coming in of the report the cause was tried before Judge PRATT without a jury on the day of January, 1884. The findings of fact and conclusions of law are found on page 30 of the Record.

Among the facts found were the following:

That the Hope Company, under the agreement of December 31, 1872, transferred to the New Jersey Company all its assets, which were *of the value of* $530,075.94, and that the latter company had received and kept all such assets except those constituting the New York trust fund.

That the Hope Company then ceased business, and in pursuance of notice to its policy-holders, premiums on their policies were paid to the New Jersey Company, amounting to more than $300,000.

That the agreement under which these assets and premiums were received was made without the knowledge or assent of all the stockholders, policy-holders or creditors of the Hope Company, was never ratified by them, was effected by means of a scheme and in the interest of the officers and directors of the companies, and was seriously injurious to the stockholders, policy-holders and creditors of the Hope Company.

That certain policies of the Hope Company, named in the findings, were exchanged for New Jersey policies by fraud.

That the New Jersey Company become insolvent prior to 1876; that the New Jersey Company, after the agreement of December 31, 1872, paid certain obligations of the Hope Company, which had then matured.

That certain persons named in the findings were stockholders, policy-holders and general creditors of the Hope Company, the plaintiffs in the suit being both policy and stockholders.

The conclusions of law and directions for decree, (page 34), related especially to the disposition of the trust fund which the Court held ought to be converted into money, and applied to pay policy-holders, and the surplus to general creditors of the Hope Company.

That it be referred back to Husted to make a new schedule of the proper distributees, and that in doing so he should state an account between the New Jersey Company and the Hope Company, charging the former with $530,075.94, and also the aggregate amount of premiums received, and deducting all sums paid by the New Jersey Company for debts of the Hope Company other than policy obligations outstanding Dec. 31, 1872, and the value of the policies of the Hope Company transferred to the New Jersey Company; and directing that if the account should appear in favor of the latter company, it should be ranked among the distributees—otherwise not.

That the agreement of Dec. 31, 1872, was fraudulent and void as to the policy-holders and stockholders permitted to rank against said assets for distribution.

On Sept. 6, 1884, at a special term, a formal interlocutory judgment was made in pursuance of Judge Pratt's decision, (Record, p. 36.) On March 7, 1885, after the further report of the referee, another decree was made, reciting the proceedings in the cause, including a further reference to Samuel F. Prentiss, and also the particulars of the schedule of distributees prepared by Husted, (which did *not* embrace the New Jersey Company,) and adjudged that the trust fund be distributed accordingly; and then, evidently in consideration of the fact that, by the report of the referee as to the account between the two companies, specially directed by the Court, the New Jersey Company proved to be a *debtor* and not a creditor—the Court, in the last paragraph of the judgment, after providing that any party interested might apply for further directions, said: "*And the question of the indebtedness of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company*, and the former superintendent, John F. Smyth, and William McDermott and Messrs. Harris and Rudd, reported by referee Samuel Prentiss, *be reserved.*"

The receiver applied for no further directions as to this decree which expressly reserved the question of his indebtedness as receiver, but *appealed from the decree* on the 8th of April, 1885, (Record, p. 43.) That appeal was dismissed by the General Term Sept. 21, 1885, and, more than a year having elapsed, the decree was beyond further appeal.

Thereupon, due notice was given to the attorneys of the receiver, (Sept. 29, 1886,) of a motion for judgment against him for the indebtedness referred to in the decree, being $531,613.94, with interest on $530,075.94, from Dec. 31, 1872, and on $1,540, from May 1, 1877.

This motion was for October 7, 1886. On that day the attorney of the receiver sent to the Court to request a postponement. At such request it was postponed to October 11th, and on that day he did not appear. (Record, p. 44.)

Thereupon, the judgment of the Court was entered, reciting the reservation of the question of indebtedness, the proof of notice given of the motion and the amount of interest accrued on the indebtedness, and adjudging that "the plaintiffs recover

of the receiver, *as such*, the amount of the indebtedness and interest, to be brought into Court by the plaintiffs and distributed in accordance of the provisions of the original decree, and such further directions as may be made by the Court, on the application of any party in interest." (Record, p. 41.)

This is the judgment or decree which the Court of Errors and Appeals of New Jersey holds is not entitled to such faith and credit as it has by law or usage in the courts of New York, from which the authenticated record of it was taken.

And the Court refused to permit the parties who recovered that judgment—policy-holders and stockholders of the Hope Company—to have any participation therefor, in the funds of the New Jersey Company in the receiver's hands, notwithstanding the fact established by the judgment that those funds must have embraced the assets of the Hope Company belonging to its policy-holders and stockholders, taken and kept by the New Jersey Company, under the provisions of an agreement decreed to be null and void, and the validity of which was expressly submitted to the Court in New York by the receiver himself in his answer to the suit in which this judgment was rendered. If that judgment was consistent with the facts presented by the record of the Court of New York, the decree of the Court of Errors and Appeals of New Jersey was erroneous and ought to be reversed.

The foregoing statement of the pleadings in the New York Supreme Court would seem to be sufficient, without further argument, to show that upon principles of equity procedure and under the New York code, the Court did not, as the opinion below declares, "adjudicate a matter not presented by the pleadings, nor within the issue," but that, on the contrary, it made a decree in pursuance of the equities disclosed as they existed between the parties, and as they necessarily arose for decision out of the question of the validity of the agreement of December 31, 1872, which question the receiver, in his answer, requested the Court to decide.

Any form of relief which the decision of that question made equitable as between the parties, was within the power of the Court, and was, in fact, its duty; and whatever form that relief might have assumed, it could not have been a matter not presented by the pleadings, or outside of the issue.

The matter under consideration is discussed in the recent book.

(*Black on Judgments*, Vol. Sec. 242.) The author says: "A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a divorce between them, it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels."

He then cites *Munday* v. *Vail*, 34 N. J. Laws, 418. To the same effect, see *Reynolds* v. *Stockton*, 43 N. J. Eq. 211, 10 Atl. Rep. 385; *Seamster* v. *Blackstock*, 83 Va. 232, 2 S. E. Rep. 36; *Wood* v. *Stanberry*, 21 Ohio St. 142; *Fithian* v. *Monks*, 43 Mo. 502; *Boswell* v. *Dickerson*, 4 McLean, 262.

As to these authorities, the case of *Munday* v. *Vail*, in which the Court of Errors relied, has been discussed fully in the brief filed by Mr. Moses.

The other cases have no force to show that the decree made in this case was not within the issue, or subject to any infirmity.

In the case of *Wood* v. *Stanberry*, 21 Ohio, a personal judgment was rendered in a suit for foreclosure, where the party did not appear, and the only service was by publication, and the defendant charged was a non resident. A levy on his goods on the personal judgment was restrained.

In *Seamster* v. *Blackstock*, 83 Va. 232, a widow brought suit for dower, and infant heirs-at-law were made defendants. The Court, *sua sponte*, made a decree to sell the lands of the infant heirs. It was held that this part of the decree might be collaterally attacked.

In *Boswell* v. *Dickerson*, 4 McLean, 262, the proceeding was *in rem* against non-residents, and a personal judgment was rendered for the payment of money which was not justified by the statute under which the proceeding was had. The party charged had no personal notice, and not even constructive notice of the claim for the money judgment. It was rightly held that such a judgment could be attacked collaterally.

Fithian v. *Monks*, 43 Mo. 502, was a foreclosure suit in which the Court assumed to render a personal judgment for deficiency against the *vendee* of the mortgaged premises, the statute only providing for such judgment against the *mortgagor*. This was plainly erroneous.

Although the person of the receiver was changed in the course of the proceedings, yet the receiver, as such, the agent of the Court, continued to appear by the same counsel; contested the the case in its stages; appealed from the order on which the judgment was founded, and had notice of the motion for that judgment and obtained a postponement of its hearing.

All parties who are represented by the parties and claim under or in privity with them, are equally concluded by the judgment, and the mere change of the agent, who represented the Court in charge of the insolvent corporation under the statute, cannot affect the matter.

The case appealed from was not a suit on the judgment, but a petition to share a fund in the custody of the Court, and a fund composed in part of assets wrongfully taken from the petitioners, as ascertained by the judgment which they offered as the basis of their claim of participation.

In *Bartlett* v. *Keim*, 50 N. J. L. 260, the Supreme Court of New Jersey, Chief Justice BEASLEY reading the opinion, in a

suit against the receiver of a corporation, declared: "These suits against receivers are anomalous in their nature. They are in fact the creatures of a court of equity, and not to be assimilated in all respects to any of the ordinary proceedings known to the courts of common law. * * * The receiver within the sphere of his duty, represents the company, and, in my opinion, he is its agent appointed, not by the corporate body itself, but by the law for certain ends of its own. * * * In my opinion, this views best harmonizes the legal status of property in the hands of a receiver with the general principles of law."

And the same Court of Errors and Appeals, in *Vanderbilt & Hopkins* v. *H. S. Little, Receiver*, 43 N. J. Eq. 669, Held, that contracts made by one receiver can be enforced against his successor. The Court said: "These contracts are not personal, but representative. They are designed to bind, and may well bind the fund, not only through the receiver who makes them, but also through the receiver who succeeds to his responsibilities and duties." *A fortiori*, it must be true that as to the acts and obligations of the insolvent corporation itself, the funds are bound in the hands of its receiver—the agent appointed by the Court, whoever he may be—and whatever number of successive agents may be named; and the plaintiffs in error whose claims are founded upon the unlawful transfer of their funds from New York to New Jersey, and are established by final judgment in the former State, should be ranked among the participants of the fund in New Jersey, which has been swelled by the wrongful abstractions, in whatsoever personal custody the Court may have seen proper to place it from time to time in the course of its administration of the estate of the corporation which perpetrated the wrong.

The decree of the Court below should be reversed.

A. Q. KEASBEY,
Counsel of Plaintiff in Error.

March 30, 1891.

Office Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 289.

HENRY E. REYNOLDS AND OTHERS, PLAINTIFFS IN ERROR,

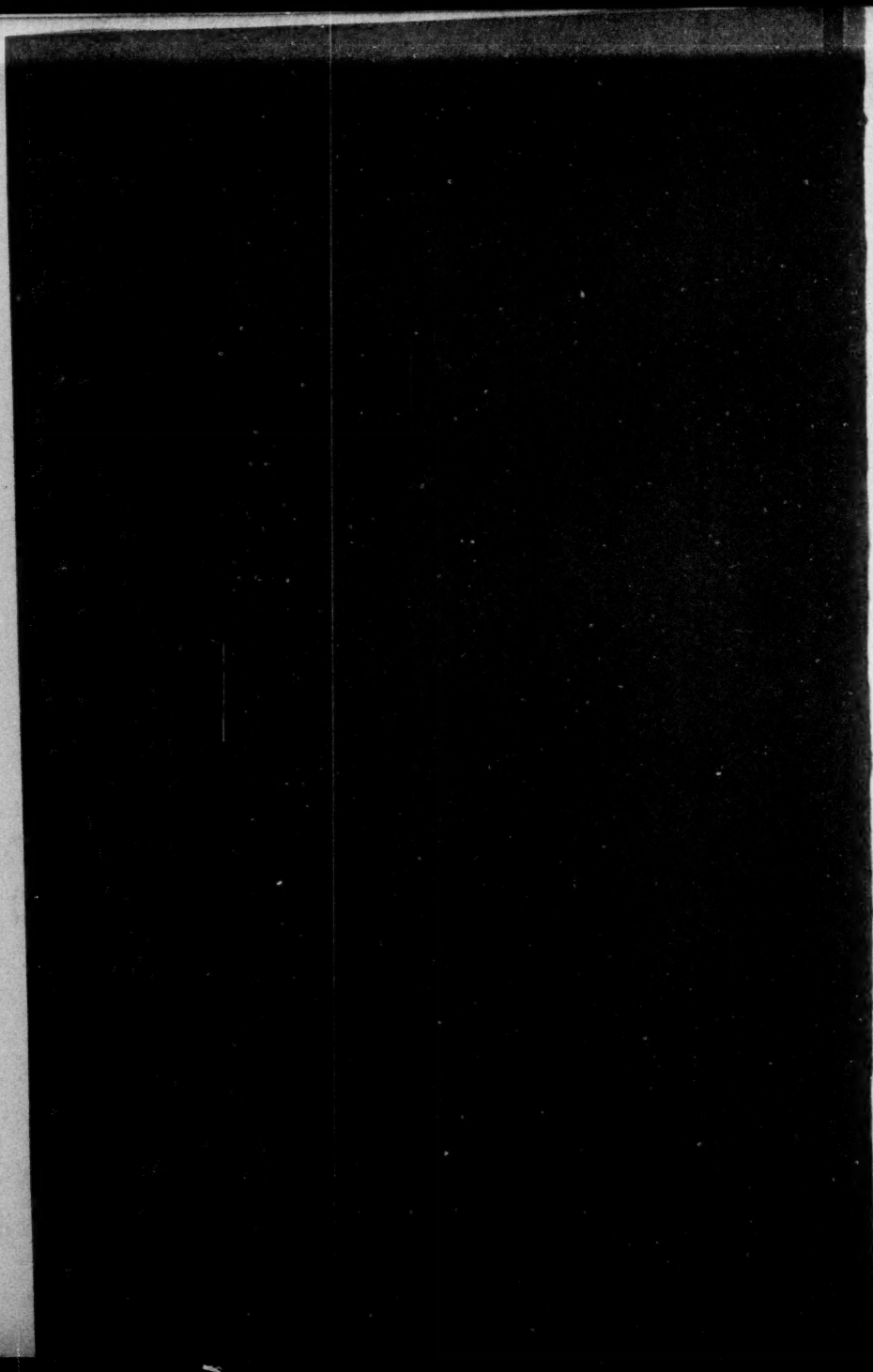
vs.

ROBERT F. STOCKTON, RECEIVER, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

FREDERIC W. STEVENS,
Of Counsel with Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



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STATEMENT OF THE CASE.

In the year 1872 the New Jersey Mutual Life Insurance Company, a New Jersey corporation, was doing business as a life insurance company at Newark, New Jersey, and the Hope Mutual Life Insurance Company, a New York corporation, was doing a similar business in the city of New York.

In September of that year a written agreement was entered into, by the terms of which the Hope Company was to re-insure the risks of the New Jersey Company, take its assets, and assume its liabilities; but by a subsequent agreement, made in December following, the position of the parties was reversed—the New Jersey Company agreeing to reinsure the Hope, upon similar terms, (pp. 45, 47 of case.)

A consolidated business was, after January 1st, 1873, done in the name of the New Jersey Company, down to January,

1877, when that company failed and went into the hands of Joel Parker, a receiver appointed by the New Jersey Court of Chancery.

Shortly afterward Joel Parker was likewise appointed ancillary receiver by the Supreme Court of New York.

In 1880, Joel Parker was succeeded by Robert F. Stockton as receiver in New Jersey, but he (Parker) continued to be ancillary receiver in New York until 1886, when he was, by order of the New York Supreme Court, discharged, and directed to turn over the assets in his hands to the New Jersey receiver, (p. 50.)

In February, 1879, the appellants in this proceeding commenced an action, (p. 14,) in the Supreme Court of New York against John F. Smyth, then superintendent of insurance in New York, the Hope Company, Joel Parker, as receiver, and the New Jersey Company ; *but the Hope Company, although its name appears as a party defendant, was not brought into court by process of summons, or in any other way during the progress of the cause*, (p. 12, at top.) *Nor did it appear, nor was it in anywise represented.*

The complaint in this action was nothing but a bill in equity filed for the purpose of obtaining a distribution of a specific fund originally deposited, pursuant to New York statute, with the superintendent of insurance, as a security to policy-holders, (p. 17, § 13.) *This was its sole purpose*, (p. 22,) and every allegation of the complaint was directed to that end, and to no other. It was alleged in this complaint, (pp. 17–18,) that the New Jersey Company had re-insured the policies of the Hope Company, had taken an assignment of its assets, and that it claimed to be the owner of the before-mentioned fund. This assignment the complaint alleged to be *ultra vires* and void, and hence the New Jersey Company was a *necessary* party to the proceeding.

Parker answered, claiming that the fund belonged to him as receiver of the New Jersey Company, (p. 23.)

Smyth answered, denying the title of the New Jersey

Company to the fund, and setting up that it could be better distributed in another proceeding, (p. 25.)

The sole question put in issue by the pleadings was, therefore, who was entitled to this fund?

These pleadings were never amended and the issue was never changed. The case was referred, and the order of reference in express terms directed the referee "to inquire into and report his findings upon all the issues of fact, and to report his opinion upon all the questions of law *raised by the pleadings*," (p. 29.)

The findings of law and fact by the Judge, upon the coming in of the report, concerned only the issues raised by the pleadings (page 30), and so did also the interlocutory decree entered thereon (page 36) in the year 1884.

The subsequent decree, entered March 7th, 1885 (page 37), which was in the nature of a final decree, adjudged only the relative interests of the parties in the deposit fund, and it was not until October 11th, 1886, and after Joel Parker had received his discharge as ancillary receiver in New York, and after the New Jersey Company had ceased to be represented there by any person authorized to represent it (page 50), that the unwarranted and illegal order was made (page 41) which, it is now claimed, has the force of a judgment in the cause.

This extraordinary order adjudges that the individual plaintiffs, viz., Reynolds, Wilbur, O'Reilly, Detmar, Sprague and Traver do recover of Joel Parker, as receiver, and against the New Jersey Company, the sum of $1,010,496.29, (page 41.)

It was, shortly after it was obtained, presented to the receiver in New Jersey. He rejected it on the ground that the time for proving claims had expired. Then application was made to the Court of Chancery for leave to prove. (page 1.) This was granted. The order was again presented and again rejected, (page 3.) From this adjudication of the receiver an appeal was taken to the Court of Chancery, which sus-

tained his decision and dismissed the appeal. Then an appeal was taken to the Court of Errors, which affirmed the decree of the Court of Chancery. From the decree thus affirmed this appeal has been taken.

Argument.

The ground of appeal to this Court must be that the Court of Chancery of New Jersey has not accorded to the so-called judgment of October 11, 1886, that full faith and credit as a record or judicial proceeding to which, under the constitution, (Art. IV, Sec. 1,) it is entitled.

Nine years before the recovery of this judgment, the New Jersey Company had been adjudged to be insolvent. At that time a receiver had been appointed in New Jersey and an ancillary receiver in New York. The judgment was, *in terms*, given against Joel Parker as such receiver, *and* the New Jersey Company, but, in *effect*, it was a judgment only against Joel Parker in his official character. At the time of its recovery, however, Joel Parker was not receiver in New Jersey. He had been succeeded by Stockton. Two questions, therefore, arise.

Is this so-called judgment entitled to any faith or credit whatever?

If entitled to any faith or credit as against Parker, and the assets which he received as ancillary receiver in New York, is it binding on Stockton and on the New Jersey assets?

Point I.

The Judgment of October 11, 1886, *is an Absolute Nullity.*

This Court has authoritatively decided that a judgment recovered in New York must have the same effect given to it in the courts of New Jersey as it has in the State of New York under its laws, (*Chew* v. *Brumagen*, 13 Wall., 501.) But these laws, so far as relied on, must be proved in the

cause. In the courts of New Jersey, they are facts, (*Knapp* v. *Abell*, 10 All. on p. 489,) and this Court will not take judicial notice of them, the Court below not having done so. (*Hanley* v. *Donoghoe*, 116 U. S., 1.) Except in so far, therefore, as the laws of New York have been proved in this case, the decision will be according to the common law. In the case in hand the only statute proved is that found on page 13 of the case. It is Sec. 1207 of the code, which prescribes that "Where there is an answer," (which is the present case,) "the Court may permit the plaintiff to take any judgment *consistent with the case made by the complaint and embraced within the issue.*" This is nothing but a succinct statement of the rule of equity practice which has always prevailed.

If the judgment in question rests for its validity upon this provision it must fall.

My contention is that the so-called judgment of October, 1886, is not merely irregular, or even voidable, *i. e.*, liable to be set aside in a direct proceeding, but absolutely void. Let us examine it.

(1) It differs altogether from the judgment of March 7th, 1885. That was a decree in equity against *all* the defendants for the distribution of a *specific fund.* It rested upon and decided the issue in the cause. The judgment of October, 1886, was a common law judgment, adjudging (p. 41) that the plaintiffs recover of Joel Parker, as receiver, *and* the New Jersey Company, *two* only of the defendants, the sum of $1,010,496.29. If this were its only defect, I freely concede that it would be irregular, but not void.

(2) But it has other and more serious defects. The suit was brought for the distribution of a *fund* by six policyholders and one stockholder, suing on behalf of themselves and all others interested, (p. 14.) It was brought in respect of property which it was claimed belonged to the Hope Company—specific property in the hands of the superintendent of insurance and by persons who claimed to have several demands against that company only. It was not remotely in-

timated that these persons had any claim, much less a claim as joint creditors against the New Jersey Company for a money demand: and not the slightest intimation was given to Joel Parker, during the progress of the cause, that any such claim would be made. And yet after these persons had, by the decree of March 1885, obtained all they asked for, they, *ex parte*, entered a judgment against him for upwards of a million of dollars, when it was perfectly obvious that if, as receiver, he owed anybody, it was the Hope Company, which had not been brought in court. Nor was this all. While the Court, in terms, adjudged that the receiver, Parker, owed the *plaintiffs*, it is apparent from the language of the concluding paragraph of the order that the recovery was to be for the benefit of the Hope Company and its creditors, for it directs that the money be brought into court and distributed in accordance with the provisions of the original decree. And this provision by itself is quite as extraordinary as the rest of the judgment. For the plaintiffs who had not been constituted receivers or representatives of the Hope Company, who had not given bond, were thereby appointed to a trust of great responsibility without notice to any one concerned, and politely requested, after they had got the money, to bring it into court.

The judgment, then, had these additional defects:

1st. Though a judgment substantially in favor of the Hope Company, it was made in the absence of the Hope Company.

2d. Though a judgment against Joel Parker, receiver, it was also made in his absence.

3d. Whether it be viewed as a judgment in favor of the plaintiffs individually, or as a judgment in favor of the Hope Company, it was *based* upon nothing. It did not adjudicate any issue. The parties had never been called into court to litigate the question of this alleged indebtedness.

This brings us to the consideration of the constituents of a record or judicial proceeding. Says Mr. Justice GRAY, in

Knapp v. *Abell*, 10 All., on page 489: "The record of a case need not state all the proceedings in detail. It is enough that it shows the subject matter of the suit, jurisdiction over the parties, and the final judgment of the Court." To the same effect is the language of this Court in *Grignon's Lessee* v. *Astor*, 2 How., on page 340: "It is enough that there be something of record which shows the subject matter before the Court, and their action upon it." With this description of a record, let us consider the matter.

1st. The Court was without jurisdiction of the parties. In *Thompson* v. *Whitman*, 18 Wall., 457, it was held that a record reciting that jurisdiction had been acquired, might be contradicted. This we do not ask, so far as the Hope is concerned. It is admitted that the Hope Company was not brought in, (p. 12,) and, as to Joel Parker, the proof of service filed fails to show any notification to him, (pp. 41, 45.) It is, moreover, an undisputed fact that, at the time the judgment was entered, he was no longer receiver. The order of discharge had been made seven months before, (p. 50); and the conditions upon which the discharge had been granted were complied with, (pp. 1, 5.) Up to the time of that discharge, the only question in litigation concerned the fund in the hands of the superintendent of insurance. That question had been finally decided. Is it conceivable that another question of far greater magnitude could have been lawfully passed upon, without so much, even, as giving Parker notice? He was a non-resident. The Court had gained jurisdiction over him for a particular purpose, and for a particular purpose only. By the judgment of October, 1886, jurisdiction was asserted for an entirely different purpose.

It will be said that he was still in court, and was, therefore, subject to its order. Suppose he was; he was not in court generally, but only for the purposes of the cause.

It will be said, again, that evidence was taken as to the state of the account between the New Jersey Company and

the Hope Company, and that, therefore, it was proper to adjudge the amount due from the one company to the other.

This overlooks the fact that the account, such as it was, was taken in the absence of the Hope Company. The Hope Company was not bound by it, and as the estoppel must be mutual to be binding, neither was the New Jersey Company. It overlooks the fact, also, that the account, so far as it was taken, was properly taken, under the issue, for an entirely different purpose, viz., for the purpose of ascertaining whether the New Jersey Company was entitled to share in the fund which was the subject of the litigation. It was first decided that the New Jersey Company was not entitled to the fund, as a whole, because the assignment was *ultra vires*. Then the question arose whether it was entitled to be subrogated to the position of those policy-holders whose claims it had paid or assumed, for the purpose of sharing in the distribution. The decision on this point was: "You (the New Jersey Company) received in assets, under the assignment, $530,075.94 (p. 34); you are to be charged with these, in the first instance, and also with the premiums you have collected on Hope policies; but, if you can show that the value of the policies transferred to you and the amount of Hope obligations you have paid, exceed the amount with which you are chargeable, then, for any excess, you may come in on an equality with other creditors of the same class and take your proportionate share," (p. 35.) This having been established as the basis of the New Jersey Company's claim, it became apparent to the receiver that the charge would exceed the credit, and all hope of sharing in the assets was, therefore, given up. Still, on an accounting between the two companies, it is manifest that the New Jersey Company would have been entitled to a considerable allowance, for it had paid all the Hope liabilities for four years, and it had become the owner of many Hope policies. Notwithstanding this condition of things, what the attorney who procured the order of October, 1886, did, was to take the amount of

$530,075.94, that being the amount of Hope assets transferred; add interest, from the time of the transfer to the date of the order, add thereto an additional sum of $1,540, and decree without giving any credit, presume the signature of a judge who had had no previous knowledge of the case. Probably, he gave no credit for the reason that the evidence on this head was wanting.

What I desire to insist upon is that the evidence was perverted from its proper purpose and made the basis of a judgment, for which it was in no wise adapted, and of which, up to the time of the final decree entered in March, 1885, no one ever dreamed.

But it may be said that by the eighth paragraph of this decree the question of the indebtedness of Joel Parker as receiver was reserved. So, in the same clause, was the indebtedness of the insurance superintendent, Smyth. This reservation had manifest reference to the above-mentioned sum of $1,540, included, as above stated, in the amount of the judgment against Joel Parker, and which appears to have been six months' interest on a mortgage held by Smyth, which, it was alleged, had been paid to Parker, but should have been paid to Smyth, (p. 2.)

The position of things was this: There was an issue and a contest respecting the fund held by the superintendent of insurance. This issue was disposed of by the decree of March, 1885. There was neither an issue nor a contest respecting anything else; nor had Joel Parker been called into court to answer any other demand. The question then comes to this: When parties have been brought into court on one issue has the Court jurisdiction, especially in the absence of all consent, to decide another matter—perfectly independent—as to which there has been no issue and no opportunity to be heard? This question would seem to answer itself.

If the Court on the petition of A should attempt to determine what B owed C, in their absence, every one would

admit that the attempt was futile, and so if, in a contest between A and B with respect to their mutual rights, it should be attempted to determine at the instigation of A, without B's consent, that B owed C, this also would be equally futile; and yet this is the very case now before the Court. Certainly a record within the meaning of the constitutional provision is not merely a judgment, but a judgment upon an issue made by parties who have been brought before the Court in the manner prescribed by law. Suppose that A and B are the parties to a foreclosure. Would it be competent for the Court, after a decree of foreclosure had been made, to adjudge at the instance of A alone, that he had been libeled by B? Why not? Both of the parties are in court. The answer is simple enough. The Court has not obtained jurisdiction over them for any such purpose.

The following authorities are in point:

Unfried v. *Hebner*, 63 Ind. 68.
Compton v. *Pruitt*, 88 Ind. 171.
Goucher v. *Clayton*, 11 Jurist N. S. 107.
Munday v. *Vail*, 5 Vr. 418.

The case of *Goucher* v. *Clayton*, (*supra*,) is very strong. It was a suit in equity to restrain the infringement of a patent. It appeared that the plaintiff had previously sued at law for damages for the infringement. *He had brought the defendant into court* for the very cause of action for which judgment was given, and yet, because there was no issue, it was held there was no estoppel. Said WOOD, *V. C.*: "I do not think that even if all the present defendants were parties to the record, a court of common law would have held, in a new action by the plaintiff, that there was an estoppel."

In *Munday* v. *Vail*, BEASLEY, *C. J.*, said: "But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to *the substance of the controversy and its essential con-*

comitants." And again: "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials—first, the Court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; third, the point decided must be in substance and effect within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions that are established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not within the issue has not, it would seem, received much judicial consideration; and yet I cannot doubt that such a defect must avoid the judgment."

The case of *Bates* v. *Delavan*, 5 Paige, 298, is in the same direction.

I think I have established that even Joel Parker, in his character of ancillary receiver in New York, would not have been concluded by this strange judgment.

Point II.

Even if it should be conceded that the judgment bound Joel Parker as ancillary receiver in New York, it would by no means follow that it bound Robert Stockton, as principal receiver in New Jersey. This was one of the grounds upon which the Court of Appeals rested its decision in the present case. It does not appear to present a federal question. And, therefore, I am entitled to insist that whether the decision were right or wrong, the appeal should be dismissed.

But I assert further, that on the principle thoroughly established by this Court, the decision was right. If Robert Stockton was bound by the judgment given against Joel Parker, it must have been because he was a privy in right. But he was not. The receiver of a corporation manifestly